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No. 2599

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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COAST SHIPPING COMPANY, a Corporation,  
Claimant of the Schooner "OCEANIA  
VANCE," Her Tackle, Apparel and Fur-  
niture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Appellee.

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Apostles.

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Upon Appeal from the United States District Court for the  
Western District of Washington, Northern Division.

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Filed

JUL 1 - 1915

F. D. Monckton,





No. 2599

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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COAST SHIPPING COMPANY, a Corporation,  
Claimant of the Schooner "OCEANIA  
VANCE," Her Tackle, Apparel and Fur-  
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PUGET SOUND TUG-BOAT COMPANY, a Cor-  
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Upon Appeal from the United States District Court for the  
Western District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libelant,

vs.

The Schooner "OCEANIA VANCE," etc.,

Respondent.

**Names and Addresses of Counsel.**

E. C. HUGHES, Esq., Proctor for Libelant and Ap-  
pellee,

661 Colman Building, Seattle, Washington.

MAURICE McMICKEN, Esq., Proctor for Libelant  
and Appellee,

661 Colman Building, Seattle, Washington.

WM. T. DOVELL, Esq., Proctor for Libelant and  
Appellee,

661 Colman Building, Seattle, Washington.

H. J. RAMSEY, Esq., Proctor for Libelant and  
Appellee,

661 Colman Building, Seattle, Washington.

OTTO B. RUPP, Esq., Proctor for Libelant and  
Appellee,

661 Colman Building, Seattle, Washington.

HARRY BALLINGER, Esq., Proctor for Claimant  
and Appellant,

533 Pioneer Building, Seattle, Washington.

CHARLES T. HUTSON, Esq., Proctor for Claimant and Appellant,

533 Pioneer Building, Seattle, Washington.

[1\*]

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**Statement.**

Time of Commencement of Suit: August 7, 1909.

Number of Cause in Lower Court and Names of Parties to Suit: Cause No. 4046. Puget Sound Tug-Boat Company, a corporation, Libelant, vs. Steamer "Oceania Vance," her tackle, apparel and furniture, Respondent; Coast Shipping Company, a corporation, Claimant.

Several dates at which the respective pleadings were filed: Libel filed August 7, 1909. Claim filed August 12, 1909. Answer of claimant filed March 28, 1910.

Issuance of Process and Service thereof: Monition and attachment issued August 7, 1909; Schooner "Oceania Vance," her tackle, etc., attached on said monition August 7, 1909; monition returned and filed August 28, 1909. Stipulation for release of vessel on \$5,000 bond filed August 27, 1909; bond in the sum of \$5,000 for release of vessel filed August 27, 1909 and vessel released to claimant.

Reference to Commissioner: April 7, 1910, cause referred to commissioner to take testimony and return the same into Court. January 28, 1914, said testimony having been taken was duly filed in said District Court by said commissioner.

Time of Trial: Thereafter said cause was duly

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\*Page-number appearing at foot of page of certified Transcript of Record.

submitted on briefs on the merits, the same being heard upon the testimony so taken before and reported by said commissioner, the same being submitted to Honorable Jeremiah Neterer, District Judge, on August 31, 1914. [2]

Memorandum decision filed August 31, 1914.

Final decree filed November 4, 1914.

Order fixing amount of stay bond, February 3, 1915.

Notice of appeal filed March 18, 1915.

Assignments of error filed March 18, 1915.

Citation issued and served March 18, 1915.

Bond for costs and supersedeas on appeal filed March 19, 1915. [3]

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*In the District Court of the United States for the  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent.

**Libel.**

To the Honorable C. H. HANFORD, Judge of the  
Above-entitled Court:

The libel of the Puget Sound Tug-boat Company,  
a corporation organized and existing under the laws



of the State of Washington, against the schooner "Oceania Vance," her tackle, apparel and furniture, and all persons intervening for their interest in said vessel, its tackle, apparel and furniture, in the cause of collision, civil and maritime, alleges as follows:

### I.

That during all the times herein mentioned said libelant was and now is a corporation organized and existing under the laws of the State of Washington, and having its principal place of business in the City of Seattle, in said State, and was the sole owner of the tug "Sea Lion," her engines, boilers, machinery, tackle, apparel and furniture, which said vessel was of the length of 107 feet, beam 22 feet, depth of hold 13 feet, and of 185 tons gross and 92 tons net measurement, and of the value of \$31,000, and which said tug said libelant used [4] and employed in towing upon the waters of Puget Sound, the Straits of Juan de Fuca and elsewhere; and during the times herein mentioned L. B. Lovejoy was the master thereof.

### II.

That the said schooner "Oceania Vance" is of 446 gross tons and 385 tons net measurement, reputed to be owned by the Coast Shipping Company of San Francisco, California, and if the length of 148.5 feet, beam, 36.1 feet, depth of hold, 11.3 feet, registered at the Port of San Francisco, California, and during the times herein mentioned F. G. Scott was the master thereof; and that during all of said times said schooner was and now is of the value of \$6,000.

## III.

That on the morning of the 9th day of June, 1909, the said tug "Sea Lion" was bound from Waldron Island in the district aforesaid, to Grays Harbor in the district aforesaid, having in tow the barge "Charger" loaded with rock, and was proceeding on her regular and usual course from said Waldron Island towards the Straits of Juan de Fuca. That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of Juan de Fuca in ballast under sail. That about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, but a fresh breeze blowing up the Straits of Juan de Fuca, being a fair wind for the said schooner, "Oceania Vance," the officers and men in charge of the navigation of said tug "Sea Lion" heard three blasts of a fog-horn ahead, and thereupon the engines of said tug were immediately slowed down and said tug's headway decreased and a few moments thereafter upon hearing the second signal from a sailing vessel approaching [5] with a fair wind, to wit, three blasts on a fog-horn, the engines of said tug were reversed, and while the headway of said tug was gone, the said schooner "Oceania Vance," approaching said tug with great speed and with all sails set, ran into, collided with, and sank the said tug "Sea Lion" so that she became and is a total loss, with the loss of all of the personal effects of the officers and crew thereof. That said collision occurred about four miles east by north of Race Rocks near the port of Victoria at the time aforesaid, and that at the time

of and preceding said collision the said "Oceania Vance" was proceeding at a rate of speed in excess of seven knots per hour, and had all of her canvas set and drawing was out of the usual and ordinary course of vessels coming up the Straits of Juan de Fuca with a fair wind such as was blowing at said time. That said schooner, in order to make greater speed under her rig, instead of running straight up the Straits of Juan de Fuca with a fair wind, was tacking back and forth across said Straits with a fair wind so as to utilize the full speed of all of her canvas, and was proceeding at an unlawful and immoderate rate of speed for the thick foggy weather then prevailing. That during all of the time up to and prior to said collision, said tug-boat was in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and crew, and the master and crew engaged on board were on the lookout for the protection and safety of said vessel and of her said tow and were constantly and regularly sounding upon her steam whistle the proper signals at the proper times, and proceeding at a moderate rate of speed, indicating that she was a tug vessel having a tow, and said [6] collision was caused without any fault or negligence on the part of the said tug "Sea Lion," or of any of her officers or crew.

#### IV.

That the said collision was caused solely by the said schooner "Oceania Vance" approaching at an unreasonable, unlawful and excessive rate of speed during the thick fog then prevailing, and especially



as she was approaching a tug-boat ahead, properly signalling her position and the fact that she was burdened with a tow. That had said schooner "Oceania Vance" shortened sail and lessened her speed and headway there would have been ample opportunity for the said tug to have heard several signals from the fog-horn of the said schooner so as to indicate her position and rate of approach and so as to have enabled said tug-boat to have avoided said schooner, but said schooner, regardless of her duty to properly navigate under the then weather conditions of thick fog at a moderate rate of speed, and in a locality frequented by vessels and out of the usual course of sail vessels approaching Puget Sound from the ocean with a fair wind up the Straits of Juan de Fuca, negligently and carelessly proceeded at a speed of over seven knots an hour up to and until the time of the collision aforesaid, causing the total loss of the said tug "Sea Lion," her boilers, engines, tackle, apparel and furniture, and that said collision and the damages resulting therefrom were caused solely by the fault and negligence of the said schooner "Oceanic Vance," her officers and crew.

#### V.

That by reason of the said collision and the loss of [7] the said tug-boat "Sea Lion," her boilers, engines, tackle, apparel and furniture, the said libelant, Puget Sound Tug-Boat Company, has sustained a loss of upwards of Thirty-one Thousand Dollars (\$31,000).

#### VI.

That the said schooner "Oceanic Vance" is now

lying in the port of Mukilteo and within the jurisdiction of this Court.

### VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said schooner "Oceanic Vance," her tackle, apparel and furniture, and that all persons having any interest in said schooner, her tackle, apparel and furniture, may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damage aforesaid, with interests therein from this date until paid, and that said schooner "Oceanic Vance," her tackle, apparel and furniture, may be condemned and sold to pay the same and that the libelant may have such other and further relief as in law and justice it may be entitled to received.

PUGET SOUND TUG-BOAT COMPANY,

By GEO. E. PLUMMER,

Its Secretary,

Libelant.

HUGHES, McMICKEN,

DOVELL & RAMSEY,

Proctors for Libelant. [8]

District of Washington,  
County of King,—ss.

George E. Plummer, being first duly sworn, on oath deposes and says:

I am the Secretary of the Puget Sound Tug-Boat Company, the libellant above named; I have heard the foregoing libel read, know the contents thereof, and the same is true according to my best knowledge and belief.

GEORGE E. PLUMMER.

Subscribed and sworn to before me this 7th day of August, A. D. 1909.

[Seal]

H. J. RAMSEY,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Indorsed]: Libel. Filed in the U. S. District Court, Western District of Washington. Aug. 7, 1909. R. M. Hopkins, Clerk. W. D. Covington, Deputy. [9]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libellant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent.

**Praeipie for Appearance [of Proctors for Libellant].**

To the Clerk of the Above-named Court:

You will please enter the appearance of the undersigned as proctors for libellant herein, and the said libellant designates Rooms 661-670 Colman Building, in the City of Seattle, Washington, the office of the undersigned, as the place where service of all papers herein, except writs and process, may be made upon said libellant, and hereby consents that such service may be made at said place.

HUGHES, McMICKEN,  
DOVELL & RAMSEY,

Proctors for Libellant.

[Indorsed]: Praeipie for Appearance. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 7, 1909. R. M. Hopkins, Clerk. W. D. Covington, Deputy. [10]

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*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT CO.,

Libellant,

vs.

Schooner "OCEANIA VANCE,"

Respondent.

**Stipulation of Libellant for Costs.**

Whereas, a libel was filed in this Court on the 7th day of August, 1909, by Puget Sound Tug-Boat Company, a corporation, against the schooner or



vessel called the "Oceania Vance," her tackle, apparel and furniture, for the reasons and causes in the said libel mentioned, and the said Puget Sound Tug-Boat Co., libellant and Geo. E. Plummer and J. F. Primrose, sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or its sureties, execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall pay all such costs as shall be awarded against them by this Court, or in case of appeal, by the Appellate Court.

Taken and acknowledged before me this 7th day of August, 1909.

AUGUSTUS ARMSTRONG,

U. S. Commissioner.

PUGET SOUND TUG-BOAT CO.

By GEO. E. PLUMMER,

Secretary.

J. F. PRIMROSE.

United States of America,

Western District of Washington,—ss.

Geo. E. Plummer and J. F. Primrose, being duly sworn, each for himself, says: That he is worth the sum of five hundred dollars over and above all his just debts and liabilities and property exempt from

[11] execution; that he is a resident of said Western District of Washington.

GEO. E. PLUMMER.

J. F. PRIMROSE.

Sworn to this seventh day of August, 1909, before me.

[Seal]

AUGUSTUS ARMSTRONG,  
U. S. Commissioner.

[Indorsed]: Stipulation of Libellant for Costs. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 7, 1909. R. M. Hopkins, Clerk. W. D. Covington, Deputy. [12]

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libellant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle, Apparel and Furniture,

Respondent.

**Praeceptum for Monition.**

To the Clerk of the Above-named Court:

You will please issue monition and deliver same to the United States Marshal for execution.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Proctors for Libellant.

[Indorsed]: Praeceptum for Monition. Filed in the U. S. District Court, Western Dist. of Washington: Aug. 7, 1909. R. M. Hopkins, Clerk. W. D. Covington, Deputy. [13]

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**[Monition and Attachment.]**

Western District of Washington,—ss.

The President of the United States of America to  
the Marshal of the United States for the  
[Seal] Western District of Washington, Greeting:

WHEREAS, a Libel had been filed in the United States District Court for the Western District of Washington, on the 7th day of August, in the year of our Lord one thousand nine hundred and nine, by Puget Sound Tug-Boat Company, a corporation, libellant, against the Schooner "Oceania Vance," her tackle, apparel and furniture, respondent, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said schooner or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said schooner or vessel, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said schooner or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the

same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held at Seattle in and for the Northern Division of the Western District of Washington, on the 26th day of August, A. D. 1909, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable C. H. HANFORD, Judge of said Court, at the City of Seattle, in the Northern Division of the Western District of Washington, this 7th day of August, in the year of our Lord one thousand nine hundred and nine, and of our independence the one hundred and thirty-fourth.

R. M. HOPKINS,

Clerk.

By W. D. Covington,

Deputy Clerk.

HUGHES, McMICKEN, DOVELL & RAM-  
SEY,

Proctors for Libellant. [14]



Office of U. S. Marshal,  
Western District of Washington,—ss.

In obedience to the within Monition, I attached the schooner “Oceania Vance” therein described, on the 7th day of August, 1909, and have given due notice to all persons claiming the same that this Court will, on the 26th day of August, 1909 (if that day should be a day of Jurisdiction, if not, on the next day of Jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. And that on the 27th day of August, 1909, I released the said vessel upon receiving a notice of bonding signed by the clerk of the U. S. District Court.

Date August 28, 1909.

C. B. HOPKINS,  
U. S. Marshal.  
By Fred M. Lathe,  
Deputy Marshal.

MARSHAL’S FEES AND EXPENSES:

For Serving Attachment and Moni-	
tion .....	\$ 2.00
Miles traveled 29, Expenses .....	2.69
Keeper’s Fees 21 days at \$2.50 per	
day .....	52.50
Releasing Vessel, on Bond .....	.50
	<hr/>
	\$57.69

[Indorsed]: Monition and Attachment. Filed  
Aug. 28, 1909. R. M. Hopkins, Clerk. [15]

*In the District Court of the United States for the  
Western District of Washington.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent,

**Claim of Ownership.**

And now Rotschild and Company intervening as agents for the interest of the Coast Shipping Company, a corporation, with its principal place of business in the City of San Francisco, owner of the schooner "Oceania Vance," her tackle, apparel and furniture, and appear before the Honorable Court to make claim to the said schooner, her tackle and apparel, as the same are attached by the marshal under process of this Court at the instance of the Puget Sound Tug-Boat Company, the said Rotschild & Company aver that they were in possession of the said schooner, her tackle and apparel, as agents at the time of the attachment thereof, and that the above-named Coast Shipping Company is the true and *bona fide* owner of the said schooner, her tackle and apparel, and that no other person is the owner thereof; and that the said Rotschild and Company are the true and lawful bailees thereof as agents. [16]

WHEREFORE, the claimant defends accordingly.

ROTHSCHILD & CO.,  
Agents for Schooner "Oceania Vance."  
TRUMBULL & TRUMBULL,  
Proctors for Claimant.

The Western District of Washington,  
County of King,—ss.

W. J. Jones, being duly sworn deposes and says: That he is a member of the firm of Rotschild and Company above named; that the owner of said schooner is the Coast Shipping Company of San Francisco; that this deponent is duly authorized to put in this claim in behalf of the owner of said schooner, and that the said claim is true to the knowledge of this deponent except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

W. J. JONES.

Subscribed and sworn to before me this 11th day of August, 1909.

[Seal] JNO. TRUMBULL,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [17]

[Indorsed]: Claim of Ownership. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 12, 1909. R. M. Hopkins, Clerk. [18]

*United States District Court for the Western District of Washington.*

No. 4046.

PUGET SOUND TUG-BOAT CO., a Corporation,  
Libellant,

vs.

The Schooner "OCEANIA VANCE,"

Respondent.

**Appearance [of Attorneys for Claimant and Respondent].**

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for claimant and respondent in the above-entitled cause; and service of all subsequent papers, except writs and process, may be made upon said claimant by leaving the same with,

TRUMBULL & TRUMBULL,

Office Address: 708 American Bank Bldg., Seattle,  
Washington.

[Indorsed]: Appearance. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 12, 1909. R. M. Hopkins, Clerk. [19]



*In the United States District Court for the District  
of Washington, Northern Division.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libellant,

vs.

The Schooner "OCEANIA VANCE,"

Respondent.

**Claimant's Stipulation for Costs and Expenses.**

Whereas, a libel was filed in this court on the 7th day of August, A. D. 1909, by the Puget Sound Tug-boat Company, a corporation, against the schooner "Oceania Vance," for the reasons and causes in said libel mentioned, and whereas a claim has been filed in the said cause by the "Coast Shipping Company," a corporation and the said Coast Shipping Company and F. A. Bartlett and H. M. Thornton, its sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said claimant or his sureties, execution may issue against their goods, chattels and lands;

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator undersigned and each of them is hereby bound in the sum of Two Hundred and Fifty Dollars, conditioned that the claimant above named, shall pay all costs and expenses which shall be awarded against it by the final decree of this Court,

or upon an appeal, by the Appellate Court.

COAST SHIPPING CO.,

By ROTHSCCHILD & CO.,

Agents.

F. A. BARTLETT.

H. M. THORNTON.

Taken and acknowledged this 11th day of August,  
A. D. 1909, before me.

JNO. TRUMBULL,

Notary Public for Washington, Residing at Seattle.

District of Washington,

Northern Division,—ss. [20]

F. A. Bartlett, H. M. Thornton, parties to the  
above stipulation, being duly sworn, each for him-  
self says: That he is worth the sum of Five Hundred  
Dollars over and above all his just debts and liabili-  
ties and property exempt from execution.

F. A. BARTLETT,

H. M. THORNTON.

Sworn to this 11th day of August, A. D. 1909, be-  
fore me.

JNO. TRUMBULL,

Notary Public for Washington, Residing at Seattle.

[Indorsed]: Claimant's Stipulation for Costs and  
Expenses. Filed Aug. 12, 1909. R. M. Hopkins,  
Clerk. [21]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libellant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent,

COAST SHIPPING COMPANY,

Claimant.

**Stipulation for Bond [for Release of Vessel].**

It is hereby stipulated by and between the parties hereto, by the attorneys for said parties respectively, that the schooner "Oceania Vance" now held and attached by the marshal by virtue of process issued in the above-entitled cause, shall be released by the said marshal, upon the execution of a bond by the claimant herein in the sum of Five Thousand Dollars (\$5,000.00).

Dated this 20th day of August, 1909.

HUGHES, McMICKEN, DOVELL & RAM-  
SEY,

Proctors for Libellant.

TRUMBULL & TRUMBULL,

Proctors for Claimant.

[Indorsed]: Stipulation for Bond. Filed in the  
U. S. District Court, Western Dist. of Washington.  
Aug. 27, 1909. R. M. Hopkins, Clerk. [22]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libellant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent,

COAST SHIPPING COMPANY,

Claimant.

**Bond [for Release of Vessel].**

KNOW ALL MEN BY THESE PRESENTS:  
That the Coast Shipping Company, as principal, and  
Fidelity & Deposit Company of Maryland, as sure-  
ties, are held and firmly bound unto C. B. Hopkins,  
Marshal of the United States for the Western Dis-  
trict of Washington, Northern Division, in the sum  
of Five Thousand (\$5,000.00) Dollars, to be paid to  
the said Marshal of the United States for the Dis-  
trict aforesaid, his successors or assigns, for the pay-  
ment of which well and truly to be made, we bind  
ourselves and each of us, our and each of our heirs,  
executors, administrators and assigns, jointly and  
severally, firmly by these presents.

Sealed with our seals and dated this 27th day of  
August, 1909.

The condition of the foregoing obligation is such,  
that, whereas, a libel has been filed in the District



Court of the United States for the Western District of Washington, Northern Division, on the 7th day of August, 1909, by the Puget Sound Tug-boat Company, a corporation, against the schooner "Oceania Vance," her tackle, apparel and furniture, for the sum of Thirty-one Thousand Dollars.

Now, Therefore, the condition of the above obligation is such that if the above-bounden Coast Shipping Company, owner of the schooner "Oceania Vance," its successors and assigns, shall abide by and answer the decree of this court, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND,

By WALTER McKAY,

Attorney in Fact.

[Seal]

Attest by: A. W. WHALLEY,

Agent.

COAST SHIPPING CO.

By ROTHSCHILD & CO.,

Agents. [23]

Sealed and delivered, taken and acknowledged,  
this — day of August, 1909, before me.

\_\_\_\_\_,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

United States of America,  
State of Washington,  
County of King,—ss.

\_\_\_\_\_ and \_\_\_\_\_, being duly sworn, each  
deposes and says:

That he is a resident of Seattle in the State of Washington, and that he is worth the sum of Ten Thousand Dollars (\$10,000.00) over and above all his just debts and liabilities.

\_\_\_\_\_,  
\_\_\_\_\_,  
Sworn to this — day of August, 1909, before me.

\_\_\_\_\_,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Approved: August 27, 1909.

C. H. HANFORD,  
Judge.

[Indorsed]: Bond. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 27, 1909. R. M. Hopkins, Clerk. [24]

\_\_\_\_\_  
[Answer.]

*In the District Court of the United States for the  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libellant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent.

To the Honorable C. H. HANFORD, Judge of the  
Above-entitled Court:

The answer of the Coast Shipping Company, a corporation duly organized under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California, intervening for its interest in the schooner "Oceania Vance," to the libel of the Puget Sound Tug-boat Company, a corporation, answers and alleges as follows:

I.

That this respondent is ignorant of the matters contained in the first article of the said libel, and as to the matters contained therein it has no knowledge, personal or otherwise, but on information and belief it avers that the same are, in a great part, falsely alleged, and that the truth is otherwise.

II.

That this respondent is ignorant of the matters contained in the third article of the said libel, as to the said tug [25] "Sea Lion" proceeding on her regular and usual course from said Waldron Island toward the Straits of Juan de Fuca, and has no personal knowledge thereof, but on information and belief it avers that the same is in a great part falsely alleged and that the truth is otherwise.

III.

That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of San Juan de Fuca in ballast under sail; that at said time she was properly manned and equipped, and had a full complement of

officers and seamen aboard, and the vessel was running before the wind and steering straight course for Point Wilson; that at said time the said "Oceania Vance" was making about five and one-half knots an hour; that about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, and a strong wind blowing up the Straits of said Juan de Fuca, it was difficult to navigate the said schooner "Oceania Vance," and the mechanical fog-horn of the said "Oceania Vance" was being blown at the intervals required by law, suddenly the loom of a vessel was seen about ——— points on the schooner's port-bow, and almost immediately afterwards there came in sight the tug "Sea Lion," sailing free on a course of about ——— and moving through the water at the rate of about seven knots. That immediately thereafter the schooner endeavored to steer so as to get out of the way of the said "Sea Lion"; that the said "Sea Lion" first reversed its engines and then started to go ahead again and that the said tug "Sea Lion" thereupon ran into, collided with and struck the said "Oceania Vance" in the stern about the thirteen foot mark. That the said "Oceania Vance" at said time was steering a straight course for Point Wilson, and had sounded fog-signals for a long time prior thereto, and in every way complied with the rules of the road; [26] that when the said "Oceania Vance" and its officers heard the whistle of the said tug "Sea Lion" they did their utmost to steer clear of anything coming near it, and had swung quite a little bit, when the said "Sea Lion" crashed into the said "Oceania



Vance.” That the said schooner “Oceania Vance” was proceeding on her usual and regular course, and that the said tug “Sea Lion” was proceeding at an unlawful and immoderate rate of speed for a steam vessel in such thick and foggy weather as then prevailed. That the said collision was in no wise caused by any fault or negligence on the part of the said schooner “Oceania Vance” or any of her officers or crew, and was caused entirely by the fault and negligence and carelessness of the said tug “Sea Lion,” her officers and crew.

IV.

That the said collision was caused solely by the said tug “Sea Lion” starting her engines and going ahead after having stopped the same. That had the said tug “Sea Lion” stopped her engines and then backed, there would have been no collision and that said collision was caused solely because the officers of the said tug “Sea Lion” so carelessly and negligently operated the said “Sea Lion” and her engines that it was impossible for the said “Oceania Vance,” her officers and crew, to avoid being struck by the said tug “Sea Lion,” and that said collision and the damages resulting therefrom was caused solely by the fault and negligence of the said tug “Sea Lion,” her officers and crew.

V.

That by reason of the said carelessness and negligence of the said tug “Sea Lion,” her officers and crew, the said schooner “Oceania Vance” sustained damages to a large amount, to wit, to the amount of \$500.00 and upwards.

## VI.

That said accident was occasioned by negligence and want of care in the master, officers and crew of the said tug "Sea [27] Lion" in first stopping said tug "Sea Lion" and then going ahead, and thus crashing into the said schooner "Oceania Vance."

## VII.

That all and singular the premises are true.

WHEREFORE, the respondent prays that this Honorable Court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise law and justice to administer in the premises.

TRUMBULL & TRUMBULL,

Proctors for Respondent. [28]

State of California,

City and County of San Francisco,—ss.

Joseph A. Oliver, being duly sworn, deposes and says:

That he is an officer, to wit, the President and Manager of the Coast Shipping Company, intervenor above named. That he has read the above and foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters that he believes it to be true.

JOSEPH A. OLIVER.

Subscribed and sworn to before me this 19th day of February, 1910.

[Seal]

FLORA HALL,

Notary Public, in and for the City and County of San Francisco, State of California.

Copy of the within Answer received and service acknowledged this 17th day of March, 1910.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
Proctors for Libelant.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 28, 1910.  
R. M. Hopkins, Clerk. [29]

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," etc.,  
Respondents.

**Order of Reference.**

Now, on this 7th day of April, 1910, the motion of Hughes, McMicken, Dovell & Ramsey, Proctors for libelant, for an order of reference in the above-entitled cause coming on to be heard, and it appearing to the Court that issue in the above cause has been heretofore duly and regularly joined;

It is hereby ORDERED that the above-entitled

cause be and the same hereby is referred to A. C. Bowman, Esquire, Commissioner, to take and report to the Court the testimony of the respective parties to said cause with all convenient speed.

Dated this 7th day of April, 1910.

C. H. HANFORD,  
Judge.

O. K.—TRUMBULL & TRUMBULL.

[Indorsed]: Order. Filed in the U. S. District Court, Western District of Washington, Apr. 7, 1910. R. M. Hopkins, Clerk. [30]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT CO.,

Libellant,

vs.

Schooner "OCEANIA VANCE,"

Respondent.

**Order [Continuing Cause for Term].**

Now, on this day upon the consideration of the Call Calendar for the May, 1913, term of court, neither party answering hereto, upon the Court's own motion pursuant to Rule 48, said cause is continued for the term. FIRST CALL.

Dated May 6, 1913.

General Order Book 4, page 128. [31]



**[Transcript of Testimony.]**

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY,  
Libelant,

vs.

The Schooner "OCEANIA VANCE," etc.,  
Respondent,  
COAST SHIPPING COMPANY,  
Claimant.

To the Honorable Judges of the Above-entitled  
Court:

Pursuant to the order of reference herein, I proceeded with the hearing of proofs in this cause, the libelant appearing by Mr. Rupp, of Hughes, McMicken, Dovell & Ramsey, and the claimant appearing by Mr. Trumbull, one of the proctors for the claimant. And on this 10th day of April, 1911, the libelant proceeded with its testimony as follows:

**Libelant's Testimony.**

**[Testimony of Capt. L. B. Lovejoy, for Libelant.]**

Capt. L. B. LOVEJOY, a witness produced on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. RUPP.) Your name is L. B. Lovejoy.

A. Yes, sir.

Q. You were master of the tug "Sea Lion" at the time of the collision between the "Oceania Vance"

(Testimony of Capt. L. B. Lovejoy.)

and the "Sea Lion," at which time the "Sea Lion" was sunk somewhere near Race Rocks?

A. Yes, sir.

Q. How long had you been master of the "Sea Lion" at that time? [32]

A. Since April 15th.

Q. How long had you been a master at that time, how long had you had a license?

A. Since January, 1898.

Q. How long had you been in the employ of the Puget Sound Tug-boat Company in the capacity of master? A. About nearly nine years.

Q. As such master you had had charge of various tugs for the same tug-boat company? A. Yes, sir.

Q. You remained in the employ of the Puget Sound Tug-boat Company sometime after this, did you? A. Yes, sir.

Q. About how long?

A. Until the first of December.

Q. Since that time you have been master of the steamer "Fairhaven"? A. Yes, sir.

Q. Plying on the waters of Puget Sound?

A. Yes, sir.

Q. Between what place?

A. Seattle and La Conner.

Q. You were familiar, were you, with the waters from Waldron Island out to Flattery, at that time?

A. Yes, sir.

Q. And had been for sometime? A. Yes, sir.

Q. What crew did you have on the "Sea Lion" at the time of the collision?

(Testimony of Capt. L. B. Lovejoy.)

A. Ten men all told. [33]

Q. And consisted of what?

A. Captain and mate, chief and assistant engineer, two sailors, three firemen and cook.

Q. Where were you bound from at the time of the collision?

A. From Waldron Island to Gray's Harbor.

Q. Did you have a tow that night.

A. Yes, we had a tow, the barge "Charger" in tow.

Q. This is how large a barge, if you know?

A. She has a carrying capacity of 1700 tons of rock at the time.

Q. You were carrying rock from Waldron Island down to Gray's Harbor for the purpose of the jetty at Gray's Harbor? A. Yes, sir.

Q. Where were you anchored at Waldron Island?

A. Cowlitz Bay.

Q. What time did you leave Cowlitz Bay?

A. I think about midnight.

Q. On the night before the collision?

A. Yes, sir.

Q. Were you on deck at the time you left Waldron Island? A. Yes, sir.

Q. When did you turn in?

A. I went to bed when we were off Tura Point on Stuart Island.

Q. What time?

A. About 25 minutes after one.

Q. At that time was there any fog? A. No, sir.

Q. Now, will you describe the relative position of your berth [34] and the wheel-house?

(Testimony of Capt. L. B. Lovejoy.)

A. Well, my berth came right up against the bulk-head of the wheel-house, the aft end of the wheel-house. The wheel-house and the Texas were all one house, on a level.

Q. Easy to get from your berth into the wheel-house?     A. Yes, sir.

Q. Now, when you left Waldron Island, you were proceeding under a slow bell?

A. We were until they got the anchor up.

Q. And that would take how long?

A. Sometimes it takes an hour. I do not just remember in this case how long it did take.

Q. Then after that you proceeded under full speed?     A. Full speed.

Q. Did you pass Discovery Island?

A. Yes, sir.

Q. About what time?

A. Well, I forget just exactly the time we passed Discovery Island, for I was in bed. Right off Discovery Island the mate started to blow the fog-whistle, one long and two short. I woke up and as soon as he blew the whistle asked him if it was getting thick, and he said yes, and they had a fog-signal on Discovery Island and they started that up.

Q. About four o'clock?     A. About four o'clock.

Q. Did you afterwards hear the Trial Island whistle?     A. Yes, sir.

Q. Your fog-whistle was still blowing at that time?  
[35]     A. Yes, sir.

Q. That kept up until the time of the collision, did it?     A. Yes, sir.



(Testimony of Capt. L. B. Lovejoy.)

Q. About how often did that fog-whistle blow?

A. Oh, about every minute or minute and a half.

Q. Well, what kind of a whistle did you have?

A. Had a very deep, coarse whistle.

Q. Now, when did you first hear the horn, if you heard any, of the "Oceania Vance"?

A. Why, about I should judge a minute and a half or two minutes before the collision; possibly a minute and a half.

Q. What time in the morning was that?

A. That was about 6:30, 6:35 or 6:40.

Q. Was it broad daylight?      A. Yes, sir.

Q. How was the fog at that time?

A. It was—well, it would clear up a little bit and then come in very thick.

Q. What was the sea?

A. The sea was moderate.

Q. How much wind was blowing?

A. I should judge it was about a 15 or 20 mile breeze.

Q. What was its direction?

A. About southwest.

Q. What course were you heading at that time?

A. About southwest three-quarters south.

Q. That was the same course that you had been on since you passed Discovery Island?

A. Yes, sir. [36]

Q. When you first heard the signal of the "Oceania Vance" what did you do?

A. Why the mate spoke to me, he said there was a sailing vessel, the "Oceania Vance," blew three

(Testimony of Capt. L. B. Lovejoy.)

whistles on a hand horn, and three whistles indicate that the vessel has the wind abaft the beam, and also three whistles, a long and two short whistles is a signal allowed by a barge or sailing vessel being towed by a tug, they can make that to show that they are being towed. I heard the whistle so plainly, and the mate said there was a vessel ahead on the starboard bow, and I said, "Are you sure it is not the barge starting to blow?" and he says, "No, I am quite certain it is ahead; it sounded quite loud," and he answered the whistle right away and almost immediately she blew another whistle, and then I was satisfied she was right ahead on the starboard bow, and I got into the pilot-house, and the mate stopped her and started to back, and when I got into the pilot-house the bow of the vessel was coming out of the fog ahead and heading directly for us.

Q. How far could you see in that fog?

A. I estimated the schooner was probably 200 feet away from us, 175 or 200 feet, as near as I could judge.

Q. Now, when you first saw the schooner, all you could see was the bow?

A. I could see the bow and the headsails.

Q. And the barge was how far behind the "Sea Lion," how much chain did you have out?

A. We had 150 fathoms of manila rope, and about 48 fathoms of wire. [37]

Q. The wire was fastened to the chain on the barge?

A. The chain was just clear of the hawse-pipe.

(Testimony of Capt. L. B. Lovejoy.)

Q. You could not see the barge at this time?

A. No, sir.

Q. Well, did you notice how many sails the "Oceania Vance" had up at that time?

A. She had all her lower sails and the mizzen gaff-topsail.

Q. Were they all full and drawing?

A. They certainly were.

Q. When you say the mate backed the "Sea Lion" immediately? A. Yes, sir.

Q. Did she then start forward again or continue backing until the time of the collision?

A. Well, when I got in the pilot-house and he said she was backing, I looked over the side and she still had her headway on her going through the water although the engines were reversed, and the "Sea Lion" was a vessel that when she backed she would throw her stern right around to port, she would back right in line with the way the vessel was coming, and I was afraid that the hawser might wind up in the wheel, so I decided I could clear the vessel by going ahead full speed, and I immediately hooked her on full speed ahead, and I motioned to the man on the lookout of the schooner to put his wheel over to clear us, and we were very full of coal and she picked up her headway very slowly.

Q. About how much headway did she have on at that time? A. The "Sea Lion."

Q. Yes.

A. At the time of the collision. [38]

Q. Yes, sir.

(Testimony of Capt. L. B. Lovejoy.)

A. I should judge she was going about two or three miles an hour.

Q. Was the towing hawser slack or taut?

A. It was slack.

Q. Well, what angle did the "Oceania Vance" hit the "Sea Lion"? A. Nearly right angles.

Q. Do you know how much of a hole it made in the "Sea Lion"?

A. Why, she opened her up between the frames, I should judge a hole was about that way (Indicating about 18 inches).

Q. That would be about a foot and a half or so?

A. Yes, sir.

Q. That is you mean in length?

A. No, I mean in width. I don't know how far down she cut.

Q. Was there anything that you could have done to have saved the "Sea Lion"? A. No, sir.

Q. Could you have got your pumps to working and pumped her out?

A. No, the pumps would not take care of it.

Q. How long did you remain on the "Sea Lion" after the "Oceania Vance" struck her?

A. Well, I should judge about a minute.

Q. Did you get your boats out?

A. No. When the "Oceania Vance" came in on us her headgear raked right over the aft end of the house, taking the [39] mast, bell-pulls, davits and the boats out, knocking one boat off the top of the house, and the davit.

Q. You got on the schooner how?



(Testimony of Capt. L. B. Lovejoy.)

A. Climbed up over her headgear.

Q. How many tons of coal did the "Sea Lion" have on at that time?     A. About 155.

Q. Full bunkers had she?     A. Yes, sir.

Q. And water?     A. Yes.

Q. The water-tank was aft?     A. Yes, sir.

Q. You got fuel and water where?

A. Ladysmith, British Columbia.

Q. Now, how was the fog at the time of the collision, very thick?

A. Yes, at that time it was very thick.

Q. And the wind you say was about 15 or 20 miles an hour?     A. Yes, sir.

Q. What direction was the wind blowing?

A. About southwest.

Q. From the southwest?     A. Yes, sir.

Q. When the mate heard the whistle of the "Oceania Vance" what did he do port or starboard his wheel?

A. After he heard the second whistle he put his wheel hard a starboard.

Q. Did the tug swing any?

A. She swung some, probably two or three points, two [40] points maybe, she was very slow answering her helm.

Q. Do you know how many fathoms of water there were at the place where the collision occurred?

A. 72 fathoms.

Q. How did you ascertain that?

A. By sounding.

Q. When?

(Testimony of Capt. L. B. Lovejoy.)

A. After we had gone back and picked up the barge. The barge was still attached to the "Sea Lion," and we sounded to see how deep the tug was down.

Q. The "Sea Lion" acted as an anchor for the barge?     A. Yes, sir.

Q. You went back the following day and took the barge?     A. Yes, sir.

Q. Do you know how long the "Sea Lion" remained afloat after the collision?

A. I should judge about three minutes.

Q. Do you know how long the "Sea Lion" was?

A. About 107 feet between perpendiculars.

Q. What was her beam?     A. 22 feet, I think.

Q. How much did she draw?     A. 14 feet.

Q. Do you know how much water there was in the tug immediately after the collision?

A. The forecastle was right aft on the "Sea Lion," aft of the engine-room below the main deck, and when the "Oceania Vance" struck us, she struck us just aft of the house, and the fireman was asleep in his bunk, and when he stepped out on the floor he was up to his ankles in [41] the water. When we left the "Sea Lion" the water was up over the bottom bunks in the forecastle.

Q. How long did the "Oceania Vance" remain in the neighborhood where the collision occurred before she went on her course again?

A. Why, we filled away—she stuck in the hole for about a minute, I presume, and the sails forcing the "Sea Lion" around, and the minute she got her

(Testimony of Capt. L. B. Lovejoy.)

*heard* into the wind the sails broke aback and she got out of the hole, and we filled away until we got headway enough on her to come about, we came back to the barge and the "Sea Lion," and I should judge it probably took us 15 minutes to get back in the vicinity of the barge; we came in to the windward of the barge and we told the men on the barge to keep hold of the "Sea Lion's" hawser until we came back to relieve him, and I should judge it took us thirty or forty minutes.

Q. Then the schooner proceeded upon what course?     A. About east by north.

Q. That would enable her to pass Dungeness light?

A. Yes, sir.

Q. Now, how was the wind after the schooner proceeded on her course, with reference to the wind just prior to the collision?

A. Well, the wind moderated right along, gradually.

Q. How fast did the "Oceania Vance" proceed after she proceeded on her course to Dungeness?

A. Well, I took the log, I guess it was about 15 or 20 minutes after we squared away on our course to Dungeness, for the first half hour on our run on the [42] square-away, she ran about three and a half knots, on the patent log.

Q. She had a patent log?     A. Yes, sir.

Q. The wind was not as fresh as it was just prior to the collision?

A. No, it was gradually dying out. Died down

(Testimony of Capt. L. B. Lovejoy.)

until after we passed Dungeness we were practically becalmed.

Q. Did you say on what course the schooner was proceeding prior to the collision?

A. Just about the same course as we did afterwards.

Q. Do you know whether she had been tacking back and forward in the straits during the night?

A. Yes, she had.

Q. Do you know how long before the collision she had wore ship?

A. About twenty minutes, they told me.

Mr. TRUMBULL.—I object to what they told you.

Q. *Do* told you that?

Mr. TRUMBULL.—I object on the ground that it is hearsay.

Q. Who told you?

A. Why, the captain and the mate both.

Q. You were just dressed in your pajamas at the time of the collision?     A. Yes, sir.

Q. Was there any of the rest of the crew asleep, if you know?

A. No, nobody asleep at the time. Some of them were in bed but they had not gone to sleep.

Q. But it took you practically no time to go from your [43] berth into the wheel-house after you heard the signal?     A. No, sir.

Q. Who else was there, anyone else on watch with the mate at the time and shortly prior to the collision?     A. Yes, sir.

Q. Do you know where he is?     A. No, I do not.

(Testimony of Capt. L. B. Lovejoy.)

Q. How long had it been daylight at the time, if you know?

A. Well, it was the 9th day of June it happened, and on the 22d of June it is the longest day of the year. I suppose it had been daylight something like three hours.

Q. How fast was the tug-boat going prior to the collision?     A. About four knots.

Q. How many pounds of steam?

A. Carried about 65 pounds of steam.

Q. How much were you allowed to carry?

A. I could not say as to that, but I think it was 80 or 90 pounds she was allowed.

Q. You had a long hawser with a large barge with a heavy load?     A. Yes, sir.

Q. And you were unable to make any great amount of speed?     A. Yes.

Q. Were the pilot-house windows open or closed?

A. Open.

Q. What time was it when you were abreast of Dungeness, if you remember?

A. Well, I could not say. I think we got into Port Townsend about four o'clock in the afternoon. [44]

Q. Was there anything that you could have done after you saw the "Oceania Vance," to have averted the collision?

Mr. TRUMBULL.—I wish to object to that, it calls for a conclusion of the witness and not for any fact.

A. Why, I do not think there was anything that we could have done that we did not do. If we could



(Testimony of Capt. L. B. Lovejoy.)

have got 12 feet forward, if we had got 12 feet further ahead, the "Oceania Vance" would have struck us in the water-tank and the tug would not have sunk. They missed it by about 12 feet.

Q. Where was the place where the collision took place with reference to some known object?

A. It was about four miles east of Race Rocks.

Q. Directly east?

A. Well, I think a little to the north of east, if I remember correctly. I know at the time we took cross-bearings at the place where the "Sea Lion" sank.

Q. Is this place where the collision happened a place that is frequented by ships, is it in the regular course of ships?

A. Not for ships bound for Port Townsend.

Q. Not for ships bound for Port Townsend but ships do pass.

A. A sailing vessel in that position we would naturally suppose she was bound for Royal Roads. He was on the other track headed for Dungeness.

Q. But that is a place where ships pass frequently, is it?

A. Very seldom sailing vessels are in that locality.

Q. Yes, but there are ships passing frequently this point. That is the regular course of ships around there? A. Yes, sir. [45]

Q. But you would not expect to see sailing ships bound on that course, but there is plenty of shipping in there?

A. There are plenty of steamers. It is pretty near

(Testimony of Capt. L. B. Lovejoy.)

the route for Victoria, steamers passing into that port.

Q. This is a correct chart, is it, of the straits between Waldron Island and Flattery?     A. Yes, sir.

Q. Now, will you indicate on this map about where you were at the time of the collision?

A. Here is Discovery Island, and right across from Discovery Island would take us right out about here.

Q. Will you mark about where you were coming before you changed your course?

A. Coming to about here. On this course we would get Race Rocks sounding abeam and then we would change our course.

Q. That point there?     A. Yes, sir.

Q. Which we will mark "A."     A. Yes, sir.

Q. Now, about where did the collision take place?

A. The collision took place about here.

Q. We will mark that point about here then "B." About how far away were you from Discovery Island when you passed it?

A. We passed Discovery Island about a mile and a half according to the mate's report.

Q. Somewhere about there.     A. Yes, sir. [46]

Q. Which we will mark as "C."

A. Passing a point in the fog, we take what we call a four-point bearing, and when we get four points on our bow we take the fog-horn, you understand four points on the bow, and then we know how fast we are going, and the time that it takes to get it four points on the beam, and that is the way we estimate our distance in a fog like that.

(Testimony of Capt. L. B. Lovejoy.)

Q. Then your course from the time you passed Discovery Island would be approximately a straight line between two points "B" and "C"?

A. Yes, sir.

Q. Indicated by this line drawn on the chart between these two points? A. Yes, sir.

Q. This is Royal Roads anchorage here.

A. Yes, sir.

Q. And you thought a schooner headed off there should come out of Royal Roads or for Victoria, or what?

A. I thought she was probably a sailing vessel bound out of Royal Roads. The schooner's position was something like this.

Q. And you met at this point at right angles?

A. Yes, that is a natural supposition to meet a sailing vessel in a southwest wind blowing three whistles that she had the wind abaft her beam, she would be heading for anchorage in there instead of heading across here.

Q. She was heading this way for what reason?

A. To get the wind so that all her sails would draw.

Q. In the position she was headed a strong wind was blowing [47] that would cause all her sails to draw. A. Yes, sir.

Q. And they were drawing at the time of the collision? A. Yes, sir.

Q. And her course was past Dungeness point down here? A. Yes, sir.

Q. And she sailed straight across for there after the collision?

(Testimony of Capt. L. B. Lovejoy.)

A. Yes, we passed Dungeness quite a ways off.

Q. Do you know on what course the "Oceania Vance" had proceeded prior to the time she wore ship shortly before the collision?

A. Well, I only know from the remarks of the captain and mate.

Q. What were they?

Mr. TRUMBULL.—I object as hearsay.

A. He said they wore ship on the American shore, I do not recollect the exact time, and he stood in and heard the horn on Race Rocks, and stood in over there to the northward, and then when they were pretty sure of their position, they wore ship and headed for Dungeness.

Q. Did they say at what point on the American shore they had worn ship?

A. He did not say the American shore, he did not say exactly what point it was, but to sail in by Race Rocks and get in the position he was when he wore ship he must have been in the neighborhood of Port Crescent.

Q. Well, in order to get into Port Crescent must he, after passing Flattery, did he make a straight course for Port Crescent or ware ship toward the Canadian shore and [48] tack?

A. According to the talk they wore ship two or three times during the night. The general course of sailing ships proceeding up the straits with a fair wind is not to make a straight run for the destination, but so change their course that all their sails will draw, and make a long leg of it with a fair wind.



(Testimony of Capt. L. B. Lovejoy.)

Q. Did the wind remain in about the same direction throughout the night?

A. As to that I could not say. Where we were at Waldron it was calm when we left there, and we did not get the wind until we got to Discovery Island.

Q. And that is where you first got the fog?

A. Yes, sir.

Q. And the fog remained throughout the night, but was it at times thicker than other times?

A. Oh, yes.

Q. And as to the point of collision you say it was pretty thick there?

A. Yes, sir. We had no fog until we got to Discovery Island.

Cross-examination.

Q. (Mr. TRUMBULL.) Captain, all you know about the movements of the schooner during the night is what you gathered from the conversation of the captain and the crew? A. Yes, sir.

Q. You did not see the schooner until you got up in the morning? A. No, sir. [49]

Q. Now, what time was it that you went to bed that night? A. 1:25, somewhere in that neighborhood.

Q. When did you wake up in the morning?

A. When we passed Discovery Island the mate started the fog-whistles.

Q. And the blowing of the fog-whistle woke you up? A. Yes, sir.

Q. What kind of whistles were they blowing at that time? A. One long and two short.

Q. Does the log show the character of whistle you



(Testimony of Capt. L. B. Lovejoy.)

were blowing?      A. Whose log?

Q. The log of the "Sea Lion"—that has gone down, though.

A. The log of the "Sea Lion" has gone with the rest of my effects.

Q. How long did you remain awake at this time?

A. Oh, I dozed along, would sleep a few minutes then wake.

Q. Did you look out and see what was the character of the weather?

A. When we first started whistling I got up and looked out of the aft door in my room, I had a door in the aft end of the room and I could look out and see the outline of the barge at that time.

Q. And you were off Discovery?      A. Yes, sir.

Q. Well, when was the next time you woke up?

A. I looked out again when we were off Trial Island.

Q. Where is Trial Island?

A. Trial Island is right out of Victoria. Here it is on the chart. [50]

Q. About how far off Trial Island were you?

A. I should judge about two miles, a mile and a half or two miles.

Q. About what time was that?

A. Well, now, it is pretty hard for me to say.

Q. I understand that.      A. I could not say.

Q. Approximately.

A. I should judge about 5 o'clock.

Q. Then you went back to bed again.

A. Yes, sir.

(Testimony of Capt. L. B. Lovejoy.)

Q. Well, when you woke up again where were you?

A. Well, I was lying awake most of the time, I was resting as I expected to have a long watch ahead of me after I did get up.

Q. You dozed from time to time, I suppose.

A. Yes, sir.

Q. A person does. Well, what next called your attention?

A. Why, I was awake when I first heard three whistles on one of these automatic hand horns.

Q. You could tell it was with a hand horn?

A. Oh, yes.

Q. Then what did you do?

A. The mate returned his horn immediately. I had been talking to him a few minutes before he said it was a sailing vessel blowing three whistles on our starboard bow and I suggested that it might be the barge we were towing starting to blow three whistles, a long and two short whistles on the hand horn is rather hard to regulate and one is apt to get one longer than the [51] *the* other. The first whistle we heard sounded like it might be a long with the two just a trifle shorter.

Q. Well, what did you do?

A. Why, the mate immediately blew a towing whistle again, and the fellow on the vessel answered almost immediately with three more whistles, and they were very close. I immediately got up, and the mate he stopped the tug and backed.

Q. The mate did. A. Yes, sir.

Q. How long did he back?

(Testimony of Capt. L. B. Lovejoy.)

A. He backed from the time he heard the three whistles until I got out of bed and got in the pilot-house, probably about 10 or 12 seconds, just got her to about backing up when I got in there.

Q. You did not take time to dress?     A. No, sir.

Q. You ran in in your pajamas. Why did you hurry?     A. The whistle sounded very close.

Q. By this time you had changed your mind about it being the barge?     A. Yes, sir.

Q. I understand that the pilot-house communicates with your cabin. What did you do when you got into the pilot-house?

A. Why, the mate reported to me that he was backing up on her, and just as I looked out of the window I could see the head-gear and bow of the schooner come out of the fog, and you could see the white water under her bow, and she was heading just about for the pilot-house, [52] and I looked over the side and we were still moving perceptibly ahead, probably at a speed of about a mile an hour.

Q. You had not overcome your momentum.

A. No. The "Sea Lion" had a habit when you backed her of swinging right around to port very abruptly. She always did that when backing up and I figured if we kept backing she would back right in front of the schooner, and by going ahead full speed we could possibly clear the vessel which I immediately signaled the engineer to do. I sent the mate below to watch the hawser to see if it had sucked down under the stern when we were backing.

(Testimony of Capt. L. B. Lovejoy.)

Q. As a matter of fact did the "Sea Lion" swing around to port?

A. She did not swing but very little. I could not say just how much, I did not watch the compass, and the only way you could tell would be by watching the compass and I did not look down.

Q. You knew that was a habit of hers? A. Yes.

Q. And you were afraid of it? A. Yes, sir.

Q. And that was the reason you changed from backing to full speed ahead? A. Yes, sir.

Q. You said something about signaling to the people on board the schooner. A. Yes, sir.

Q. What did you do?

A. Why, they had a man on the lookout on the schooner and [53] I motioned for him and hollered to him to put the wheel over and that would give us a little more time to get by him, but as near as I could see they made no perceptible change in the vessel's course.

Q. Do you know whether or not they put the wheel over? A. I do not.

Q. But as far as you could judge from your position, she apparently did not change her course in any perceptible degree?

A. No, as I remember the testimony of the United States inspector's office, the captain testified that he did not put the wheel over, because he thought it would be impossible and would make no perceptible difference in the course and there was bound to be a collision anyway.

Q. That is your recollection of what he testified



(Testimony of Capt. L. B. Lovejoy.)

at that time.      A. Yes, sir.

Q. Now, when you got into the pilot-house and saw the bow of the schooner, about how far were the two vessels apart, according to the best of your judgment?      A. Oh, I should judge about 200 feet.

Q. You say that this was a very thick fog.

A. Yes, sir.

Q. Now, do I understand you, Captain, to say that up in this neighborhood, where you have marked here, is not a course where schooners and windjammers and various kinds of vessels are apt to be?

A. Yes. They are apt to be up that way, but not bound for Puget Sound or Port Townsend. A vessel in that position would naturally be assumed to be bound for Royal Roads. [54]

Q. Did you assume that this vessel was bound for Royal Roads when you heard her whistle first?

A. The first time I heard her whistle I assumed that it was the barge astern of us. The second time I had no doubt about it, because that time the whistle was so close aboard.

Q. Well, then, it would not indicate that she was bound for Royal Roads or where bound, as far as the facts and circumstances connected with this case are concerned.

A. No. The only difference it would make, if she had been bound for Royal Roads there would have been no collision.

Q. If she had been headed another way.

A. Yes, sir.

Q. This place where you have marked B, is that



(Testimony of Capt. L. B. Lovejoy.)

where the collision occurred?     A. Approximately.

Q. And you were headed for this point A?

A. Yes, sir.

Q. Where you would have changed your course?

A. Yes, sir.

Q. Now, a schooner coming up the straits, even with a fair wind, she, as you stated, necessarily tacks?

A. Not necessarily. They tack for the reason they can get more speed by getting all their sails to draw by taking the wind from the quarter.

Q. Of course, that is the reason for tacking.

A. A schooner with a fair wind, if she was proceeding in a straight line, would not make as great speed as she would by tacking and taking the wind at an angle.

Q. Because the stern sails would catch the wind and kill [55] the others.

A. That is the idea exactly.

Q. Was this such a wind that she could have come up the straits without tacking?     A. Certainly.

Q. That is what you would call a fair wind?

A. Fair wind, yes, sir.

Q. You haven't any idea what speed the "Oceania Vance" was making, have you?     A. Yes, sir.

Q. What is your idea?

A. I presume she was making in the neighborhood of eight knots.

Q. Why do you presume that?

A. Because, after the collision and after we squared away with a more moderate breeze her own log showed a register of seven knots an hour.

(Testimony of Capt. L. B. Lovejoy.)

Q. That is after she picked you boys up?

A. Yes.

Q. And so you assumed that prior to the collision she was making at least that speed? A. Yes, sir.

Q. Supposing you had continued to back up, don't you think you would have avoided the collision?

A. Well, it is questionable whether we would or not. The schooner had the wind on her starboard quarter, and she was making more or less leeway, she would be setting down on us; if we had backed up we would have been in such shape that neither one of us could have got clear as near as I could figure it out, that is the way it [56] looked to me. We took the chance if we backed up of getting the hawser in our wheel where we would have been perfectly helpless.

Q. And so judging all the circumstances as they presented themselves to you in this hurried moment, you decided that full speed ahead was the best course for all concerned.

A. Yes. If the mate had not stopped the vessel, if he had proceeded as we were going, the schooner would have passed between us and the barge, over our tow-line.

Q. If the mate had not stopped.

A. Yes, but the law requires you to use all precaution in nearing a vessel in a fog.

Q. And you endeavored to follow it.

A. Yes, sir.

Redirect Examination.

Q. (Mr. RUPP.) That is the rule in meeting a

(Testimony of Capt. L. B. Lovejoy.)

vessel in a fog, apparently under the circumstances that you met this vessel, you are to stop and back full speed astern.     A. Stop your vessel, yes.

Q. Do you remember asking the mate just before this collision what time it was?

A. I could not say that I did.

Q. But you were awake.

A. Oh, yes; I was awake at the time.

Q. Before you heard the whistle.     A. Yes, sir.

Q. The first signal of the schooner.     [57]

A. Yes, sir.

Q. You have testified that the "Sea Lion" had its full complement of officers and crew. Was she in other ways well equipped and appareled?

A. Yes, sir.

Q. The course that you took after you passed Discovery Island, and the course on which you were proceeding at the time of the collision, is the ordinary and usual course for steam vessels proceeding out towards the straits?     A. Yes, sir.

Mr. RUPP.—I offer in evidence the chart identified by the witness, with the marks on it, in connection with the testimony of the witness.

Chart marked Libellant's Exhibit "A," filed and returned herewith.

Hearing adjourned, to be resumed by agreement.

Seattle, Washington, April 22, 1912.

PRESENT: Mr. HUGHES, for the Libelant.

Mr. TRUMBULL, for the Claimant.

**[Testimony of William J. Smith, for Libelant.]**

WILLIAM J. SMITH, a witness called on behalf of the libelant being duly sworn, testified as follows:

Q. (Mr. HUGHES.) Mr. Smith, what is your business? A. Marine engineer.

Q. How long have you been a marine engineer?

A. Since 1902.

Q. Were you chief engineer on the tug "Sea Lion" at the time of her collision with the "Oceania Vance," in June, 1909? A. Yes, sir.

Q. How long had you been chief engineer of that tug?

A. Since the latter part of March sometime.

Q. At the time of this collision what voyage was the "Sea Lion" prosecuting?

A. Why, she had a barge, I do not know the name of it, but she was bound for Gray's Harbor.

Q. Towing a barge with stone? A. Yes, sir.

Q. From what island?

A. Waldron Island.

Q. Bound for where? A. Gray's Harbor.

Q. Were you on duty at the time of the collision?

A. No, sir.

Q. Who was on duty?

A. Mr. Lewis, the assistant.

Q. Approximately, what was the length of the "Sea Lion"? [59]

A. 107 to 109 feet, something like that.

(Testimony of William J. Smith.)

Q. Where was the engineer's cabin located?

A. Just forward of the engine-room on the star-board side.

Q. On the main deck.      A. On the main deck.

Q. And the captain's cabin and the pilot-house were above.      A. Yes, sir.

Q. Where was the engine-room with reference to that cabin?      A. Aft of my room.

Q. On the same level or below?

A. Just a trifle below, three or four feet below; it took in the hull part of the boat, you know, the engine-room.

Q. What time did you retire that night?

A. One o'clock or a little after, maybe.

Q. And when would it have been time for you to go on duty again?

A. Seven o'clock in the morning.

Q. Did you hear fog-whistles at any time in the early morning?      A. Yes, sir.

Q. Do you remember about how early it was when you first heard the fog-whistles on your own boat?

A. I would not know how early it was. I could hear them maybe an hour or two; I should judge it might have been half past four or five o'clock, something like that.

Q. You awoke at the time you heard your vessel?

A. Yes, sir.

Q. Did you look out and learn whether there was any fog, or have any other means of knowing except by your own whistle?

A. No, I did not look out. [60]



(Testimony of William J. Smith.)

Q. How were the whistles sounded?

A. One long and two short.

Q. At about what intervals?

A. About a minute or less.

Q. Now, did you fall asleep again after hearing the fog-whistles first?     A. Yes, sir.

Q. About when, with reference to the collision, did you wake up?     A. Just shortly before.

Q. Had anything unusual occurred to wake you, or did you wake naturally?

A. No, I heard the bells ring in the engine-room.

Q. What bells did you hear?

A. The stop bell and back bell.

Q. Was that unusual at that place in your trip?

A. Yes, unusual.

Q. Did that attract your attention?

A. Yes, sir.

Q. How many bells were given to stop?

A. Two bells.

Q. Is that the regular signal?     A. Yes, sir.

Q. And how soon after that were bells given to reverse?

A. Well, I could not tell; it was very shortly after that, right away you might say.

Q. How many bells are given for reversing full speed?     A. Two bells to back up.

Q. You heard these two signals did you; then what did you do?     A. I got up and looked out. [61]

Q. Which side of the ship was your window on?

A. The starboard side.

Q. Did you open your window to look out?

(Testimony of William J. Smith.)

A. Yes, sir.

Q. What occurred and what did you see?

A. Well, I did not see anything just for a second until I looked again and then I saw this vessel coming into us.

Q. Do you remember at or about the time of hearing these bells and getting up, you heard any whistles from your boat?     A. Yes, sir.

Q. What was it?

A. Well, the first, just as I got up they blew their regular tow whistle.

Q. Fog-whistle you mean?

A. Yes, and when I looked out they blew the danger signal.

Q. Now, you say when you first looked out you did not observe anything, and then you noticed what?

A. I noticed this vessel right close to us.

Q. How did it appear to be approaching?

A. Head on, nearly so.

Q. How near did it seem to you to be?

A. Fifty or sixty feet.

Q. What did you do?

A. Why, I got out as quick as possible.

Q. Well, how would you get out?

A. I opened my door and came out on deck.

Q. The door on the port side.

A. Starboard side.

Q. The door is on the starboard side. [62]

A. Yes.

Q. You went from the window to the door and out on deck.     A. Yes, sir.

(Testimony of William J. Smith.)

Q. How soon after you got outside was it that this collision occurred?     A. Maybe half a minute.

Q. Well, as long as that, do you think, with reference to getting on deck?

A. Yes, might be or might not as to time.

Q. Did you hear any other signals to the engineer?

A. Yes, I heard the bell go ahead, full speed ahead bell.

Q. Now, when was that, about how long before the collision occurred?

A. Just barely—you might say no time at all, that is the way it would seem.

Q. Well, in any event, not more than a few seconds?     A. Seconds, it was down to seconds.

Q. Where did the "Oceania Vance" strike you?

A. About 20 feet forward of the stern.

Q. How did she strike, what kind of a blow?

A. Head-on blow, right straight in, very near.

Q. Well, with a good deal of speed or force?

A. Considerable force.

Q. How did it affect your boat?

A. Well, it listed her over pretty bad; had a tendency to shove her over quite a bit.

Q. How much of a hole did she cut into the "Sea Lion"?     A. I should judge three or four feet.

Q. Do you know about how far her bow plowed into the starboard quarter of the "Sea Lion"? [63]

A. About three feet I should say or maybe more.

Q. Well, did she remain like that with the "Sea Lion" for any time?

A. Yes, she was there for maybe three minutes,

(Testimony of William J. Smith.)

maybe less or maybe more, I would not be sure about it.

Q. In the meantime what occurred?

A. Well, the captain of the ship he told us to get off, he said he would hurry up.

Q. The captain of the "Oceania Vance"?

A. Yes, sir.

Q. Did the captain come forward on the bow of the ship?

A. Yes, when I saw him first that is where he was.

Q. He called to you and the others to get aboard his ship? A. Yes, sir.

Q. Did the crew of the "Sea Lion," including yourself, get aboard of the "Oceania Vance"?

A. Yes, sir.

Q. How did you get aboard?

A. Climbed up the back-stays or bob-stays, whatever they are.

Q. On the bow?

A. On the bowsprit or jibboom.

Q. How did the "Oceania Vance" get away from the "Sea Lion"?

A. She just naturally broke out; her own headway carried her out, I suppose.

Q. Swung out and broke loose? A. Yes, sir.

Q. Well, had the crew any more than time to get aboard of her before she parted from the "Sea Lion"?

A. No, sir; they did not have any more than time; just time enough to get away. [64]

Q. What kind of a ship was the "Oceania Vance"?

(Testimony of William J. Smith.)

A. Three-masted schooner.

Q. Did you notice her sails?      A. Yes, sir.

Q. How were they set?

A. They were all set—I would not say about her top-sails, but she had all her lower sails on.

Q. What occurred after that?

A. Well, we ran maybe a couple of minutes, three minutes maybe and tacked back again.

Q. You all turned loose and helped swing her sails over?

A. Everybody gave them a hand to get her around into the wind.

Q. When she got back where was the “Sea Lion?”

A. She was gone; she was sunk out of sight.

Q. At that time did you see the barge that was in tow?

A. No, we did not see her until we came back again, then we seen the barge.

Q. Did you pick up the barge and speak to her?

A. Yes, sir.

Q. Then what did the “Oceania Vance” do?

A. They started away then for Port Townsend.

Q. Came with her into Port Townsend, did you?

A. Yes, sir.

Q. Did you notice what speed she made right after this collision?      A. Seven knots.

Q. Did you have any conversation with the captain of the “Oceania Vance,” as to what speed she had been making prior to the collision? [65]

A. I did not hear them say prior to that, but at the



(Testimony of William J. Smith.)

time they said they figured that they were making seven knots.

Q. Would the noise of the engine-rooms below you prevent your hearing the signals from another vessel outside?     A. Oh, yes.

Q. Then you do not know anything about whether any signals were given from the "Oceania Vance" or not, that is from what you heard?     A. No, sir.

Q. You did not hear anything?     A. No, sir.

Cross-examination.

Q. (Mr. TRUMBULL.) You were one of the engineers, Mr. Smith?     A. Yes, sir.

Q. You wakened on this particular morning by certain signals given the engineer?     A. Yes, sir.

Q. What was the first signal that you heard?

A. Heard the stop bell.

Q. A stop bell?     A. Yes, sir.

Q. That is the two signals.

A. One is to slow down and another one is to stop, entirely.

Q. Well, this was the stop signal that you heard first?     A. Yes, sir.

Q. Had there been any slow-down signal?

A. Not to my knowledge, not before that.

Q. If there had been you probably would have heard it?

A. I very likely would have wakened up; might not.

Q. Just as liable to have heard it as you were to have heard [66] the stop signal?     A. Yes, sir.

(Testimony of William J. Smith.)

Q. How long after the stop signal did you hear the reverse signal?     A. Well, it was right away.

Q. It followed immediately?     A. Yes, sir.

Q. Then what other signal came after that?

A. Go-ahead signal.

Q. How long after the reverse did the go-ahead signal come?     A. Right away, not very long.

Q. Just followed immediately?

A. Not immediately, you know.

Q. Within a few seconds?

A. Yes, I could not say without the time, you know. I was out of the engine-room; if I had been in the engine-room I could have paid attention to the exact time.

Q. But in your opinion now, at this time, would you say it was right immediately?

A. Well, very nearly so, not immediately; not long afterwards no time elapsed, you know, that you could call it any time.

Q. Would you call it a minute?

A. Might or might not. If you were paying strict attention; might probably be a minute; if I had been in the engine-room, then I might know, you know.

Q. But you cannot state now what particular space of time it was?

A. Well, might be a minute or might be right away quick, you see.

Q. Well, when the go-ahead signal was given, what did you do? [67]

A. Why, I ran to the engine-room and told the engineer on watch to hook her on.

(Testimony of William J. Smith.)

Q. You ran to the engine-room? A. Yes, sir.

Q. You left your stateroom. Does the stateroom open into the engine-room? A. No, sir.

Q. You went out on deck and went to the engine-room?

A. I was on deck at the time that the go-ahead bell was given.

Q. Well, now, then, where were you when the signal to reverse was given? A. In my room.

Q. You jumped up then? A. Yes, sir.

Q. And went outside? A. Yes, sir.

Q. And after you got outside, why the go-ahead signal was given? A. Yes, sir.

Q. Could you see the schooner at that time?

A. Yes, sir.

Q. Where was the schooner?

A. She was on our starboard side.

Q. About how far off?

A. I guess 50 or 60 feet; that is my judgment.

Q. You were on deck at that time? A. Yes, sir.

Q. Was that the first time you had seen the schooner? A. Yes, sir.

Q. You did not see her from the time you were in your cabin? [68]

A. Well, I just imagined I did and stuck my head out to see.

Q. But you were not positive that you did see her?

A. No, I would not be sure that I did; then I was out on deck and I knew I seen her.

Q. And she was about 50 or 60 feet, in your opinion, from the tug? A. Yes, sir.

(Testimony of William J. Smith.)

Q. And the tug and the schooner were approaching each other?     A. They certainly were.

Q. At least you supposed they were.

A. Yes, sir.

Q. You were on deck when the collision took place?

A. Yes, sir.

Q. Did you hear the fog-horn of the schooner while you were on deck?     A. No, sir.

Q. You were considerably excited during that time?

A. Well, no, not as much as I was afterwards.

Q. Did it appear to you, when you were on deck before the collision, that there was a collision inevitable?

A. It was bound to happen unless something out of the ordinary would stop it, you know.

Q. After the collision and you were taken on board the schooner, you were taken to Port Townsend, were you not?     A. Yes, sir.

Q. Now, you stated to Mr. Hughes, that the schooner was going seven knots an hour after you got aboard?     A. Yes, sir.

Q. How do you know?

A. Well, I just know from what I heard the men say there. [69]

Q. Who did you hear say?

A. Well, I would not be sure whether the captain spoke or the mate, but I heard them say seven knots.

Q. That is all you know about it?     A. Yes, sir.

Redirect Examination.

Q. (Mr. HUGHES.) You spoke of the two bells,

(Testimony of William J. Smith.)

being one to slow down and the other to stop. In this instance were they given one immediately after the other?

A. Well, that is the way it sounded to me.

Q. Well, when a vessel is going along at a given rate of speed and wants to stop?

A. When they are going to stop quick they just bring the two of them right together. If they want to slow down they ring the slow bell, maybe a minute or half a minute or maybe longer between.

Q. How was it in this instance?

A. Well, I could not be sure just how long it was; but they were very close together, you see.

Q. And then, of course, the two bells to reverse.

A. Yes, sir.

Q. You said in answer to Mr. Trumbull, that the two ships were approaching each other. When you came outside and saw the "Oceania Vance," what was her position with reference to the position of the tug?

A. I meant to tell the gentleman that one was approaching but the other one was not, as near as I could see the ship was approaching us.

Q. The tug was crossing her bow? [70]

A. Yes, sir.

Q. And when you came outside of your door on deck, about what part of the ship did you stand in, where was your cabin door?

A. It is very near amidships.

Q. Now, which side of you was the "Oceania Vance" heading?



(Testimony of William J. Smith.)

A. Very near right where I stood.

Q. Heading apparently right amidships?

A. Yes, sir.

Q. And you picked up enough speed so that when she actually collided with you, how far back did she strike?

A. Well, it would be twenty feet from the stern.

Q. Be somewhere about 40 or 50 feet back of you?

A. Yes, back of where I was.

Q. You testified on your cross-examination that when you heard this go-ahead signal, you stepped to the engine-room door and told the assistant to hook her on?     A. Yes, sir.

Q. What reply did he make to you?

A. He says, "She is."

Q. She is already hooked on?     A. Yes, sir.

Q. After you had got aboard the "Oceania Vance" and had left the scene of the collision on your way to Port Townsend, how were the wind and the fog, did they remain the same?     A. No, sir.

Q. What difference was there?

A. The wind moderated and the fog cleared up. I did not notice just the time. I did not pay much attention to the time when it did clear up. But it cleared up shortly [71] afterwards, probably ten o'clock, maybe nine o'clock, somewhere along there, I would not be sure. The wind moderated right away.

Q. As a man accustomed to the sea, what is the fact in respect to the wind in case of fogs on the straits?

(Testimony of William J. Smith.)

A. Well, it is generally a good fresh breeze as long as it is foggy.

Q. How is it as the fog clears?

A. Generally the wind stops; that is to my knowledge. Some men might think different things.

Q. (Mr. TRUMBULL.) Do you say, Mr. Smith, that when there is a fog there is generally a fresh breeze?

A. Well, in that particular time of the year there is more wind, every time you see a fog in the straits you see a fresh breeze of wind.

Q. That would be in June?

A. Along in the summer-time it is westerly winds you see.

Q. Well, is it not a fact that invariably during fog there is not any breeze to speak of?

A. Well, I would not say invariably. Up in here probably and other places. Sometimes you might see it down there when there is no wind at all.

Q. But as a general proposition on the straits, is it not a fact that during periods when there is a fog at all there is no breeze to speak of?

A. Oh, yes, there are periods when there is no wind at all.

Q. Have you had very much experience in sailing the straits?

A. Well, I have been on these towboats up and down here for very nearly ten years now. [72]

Q. What are you doing now, Mr. Smith?

A. I am working for the Puget Sound Tug-boat Company.

(Testimony of William J. Smith.)

Q. Been working for them all the time?

A. Well, most of the time.

Q. You are in their employ now?      A. Yes, sir.

(Testimony of witness closed.) [73]

**[Testimony of C. H. Lewis, for Libelant.]**

C. H. LEWIS, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HUGHES.) What is your business, Mr. Lewis?      A. Marine engineer.

Q. How long have you been a marine engineer?

A. Since 1902.

Q. Were you assistant engineer on the "Sea Lion" at the time of the collision between the "Oceania Vance" and the "Sea Lion"?      A. Yes, sir.

Q. How long had you been on her?

A. Three years.

Q. Were you on duty at the time of the collision?

A. Yes, sir.

Q. How long had you been on duty?

A. Since one o'clock.

Q. How is the engine-room situated with reference to the deck of the "Sea Lion"?

A. About three feet below the working platform.

Q. The door opened out so that you can look across the rail of the "Sea Lion"?

A. Yes, sir, a door on each side you can look out.

Q. And your platform is high enough so that you can see over the rail?      A. Yes, sir.

Q. As you look out through the door?

A. Yes, sir.

Q. Did you observe, while on duty, about what

(Testimony of C. H. Lewis.)

time the fog came on that morning?

A. Well, I know by the time the whistle started. I looked out [74] then. It was four o'clock.

Q. How were the whistles sounded then, from that on all the time until the collision?

A. Regularly, about every minute.

Q. What whistle was given?

A. Long and two short.

Q. You had a tow, did you?      A. Yes, sir.

Q. What tow?

A. We had a stone barge for Baldwin Island, Grey's Harbor.

Q. The barge was on how much of a hawser?

A. I do not know that, I could not say.

Q. What was the first thing that occurred that attracted your attention, with reference to the proximity of another ship?      A. The stop bell.

Q. You had not heard any whistles from any other ship?      A. No, sir.

Q. If they had been given you would not have heard them on account of the noise in the engine-room?      A. No, sir.

Q. But you could hear the whistles of your own ship?      A. Oh, yes.

Q. Now, what was the stop bell?      A. Two bells.

Q. What speed had you been going before you received that stop bell?

A. Going about three quarters.

Q. That would be about what speed?

A. Under the jingle. It is just the same as two bells, stops [75] her. That is to say if you do not

(Testimony of C. H. Lewis.)

get confused on your bells.

Q. You say you were going three-quarters speed; about what speed is that?

A. What do you mean, the revolutions?

Q. How many revolutions were you going?

A. About sixty-five.

Q. What are your authorized revolutions, what revolutions can you make, or do you make, full speed?

A. Well, I don't know; very seldom we run full speed, that is drive her. I do not know what she would do if driven. We make about 90 turns.

Q. While running with your tow was she heavily laden at that time? A. Yes, loaded with stone.

Q. The tow was? A. Yes, sir.

Q. And how was your own ship?

A. She was loaded too.

Q. With what? A. Coal.

Q. How much coal did she have aboard?

A. About 150 tons I guess or 155 tons.

Q. Had she just taken on coal at Ladysmith before starting on the trip? A. Yes, sir.

Q. I do not think I got an answer to my question in miles. About how many miles do you think, with your revolutions and with your tow, your boat was making through the water prior to the time you got your stop bell? [76] A. About five miles.

Q. What did you do when you received the stop bells? A. Stopped her.

Q. Stopped her engines. A. Yes, sir.

Q. Did you receive any other signals?

A. Yes, sir. There was just a slight pause and



(Testimony of C. H. Lewis.)

then I got two more.

Q. What did that mean?

A. That means back up.

Q. It meant full speed astern? A. Yes, sir.

Q. Did you give her engines full speed astern?

A. Yes, we always do in case of that kind.

Q. How long were you running full speed astern?

A. Well, not more than a quarter of a minute, I guess.

Q. Then what happened?

A. I got full speed ahead again.

Q. How many bells?

A. One bell and a jingle—two bells and a jingle. I was backing up; two bells and a jingle.

Q. That would mean stop the engines and then go ahead? A. Yes, sir.

Q. What was the significance of the jingle?

A. Full speed, all I could get out of her.

Q. Did you answer that signal? A. Yes, sir.

Q. You stopped her engines and then went full speed ahead? A. Yes, sir.

Q. About how long had you been running before you heard the [77] impact of the collision, how long had you been running ahead?

A. Well, it was just after I got her hooked on; it was almost well, I had not let go hold of the throttle or anything of that kind, when she struck.

Q. What did you do then?

A. Well, I stood by.

Q. Did you hear any danger signal?

A. I could not tell; I heard whistles at the time I was not paying any attention to anything like that,

(Testimony of C. H. Lewis.)

I was listening to my own signals.

Q. What did you do after you heard the collision?

A. I stayed there and waited until I heard them call out on deck to leave, for everybody to leave.

Q. Then what did you do?

A. I went out on deck.

Q. Had the others left at the time you got out?

A. Yes, sir.

Q. What did you do?

A. I got aboard the schooner.

Q. Were you the last one to get aboard the schooner? A. Yes, sir.

Q. How did you get aboard?

A. Jumped aboard. They were aboard when I came out and I jumped and caught the bobstay.

Q. And climbed up? A. Yes, sir.

Q. That is they were pulling apart, but near enough so that you could jump and catch the bobstay? A. Yes, sir. [78]

Cross-examination.

Q. (Mr. TRUMBULL.) What are you doing now, Mr. Lewis?

A. Marine engineer, the same.

Q. Working for the Puget Sound Tug-boat Company? A. Yes, sir.

Q. Been working for that company ever since you got wrecked on the "Sea Lion"? A. Yes, sir.

Q. When you say that you were making about five miles an hour I suppose you mean nauticle miles?

A. I suppose so, yes, sir.

Q. When you saw the schooner the collision had

(Testimony of C. H. Lewis.)

taken place?     A. Yes, sir.

Q. You did not see the schooner before the collision?     A. No, sir. I was in the engine-room.

Q. You did not look out?     A. No.

Q. You stood by your engines?     A. Yes, sir.

Redirect Examination.

Q. (Mr. HUGHES.) There is one question I omitted to ask you, Mr. Lewis. How did the "Sea Lion" respond when you gave her full speed ahead?

A. Quite promptly, she started to pick up pretty fast.

Q. Have you been engineer or assistant engineer on different tugs of the tug-boat company?

A. Yes, sir.

Q. How did the "Sea Lion" pick up in response to the full speed ahead of the engine, as compared with other tug-boats? [79]

A. She was very sensitive, quick to back or go ahead, very quick.

Q. Did you observe the sails of the "Oceania Vance" when you got aboard?     A. Yes, sir.

Q. Were they all set?

A. All but the foretopsail.

(Testimony of witness closed.)

Hearing adjourned. [80]

Seattle, Washington, April 26, 1912.

PRESENT: Mr. HUGHES, for the Libelant.

Mr. TRUMBULL, for the Claimant.

**[Testimony of Capt. H. E. Stream, for Libelant.]**

Capt. H. E. STREAM, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HUGHES.) What is your business or calling?

A. Master mariner; going to sea for a living.

Q. What ship are you master of at this time?

A. The "Aberdeen," a steam whaler; she is not in commission just yet.

Q. How long have you held a master's license?

A. Since the 1st of March, 1910, I think.

Q. Prior to that did you hold a mate's license?

A. Yes, sir.

Q. For the waters of Puget Sound and tributary waters? A. Yes, sir.

Q. How long had you held a mate's license prior to obtaining a master's license?

A. Since 1907 I think it was that I got a mate's license, a coast license; in 1905 I had a Puget Sound license.

Q. Were you first mate on the tug "Sea Lion" at the time of the collision with the "Oceania Vance"?

A. Yes, sir.

Q. Just before starting on that voyage had the "Sea Lion" been to Ladysmith and taken on a full cargo of coal for her own steam purposes?

A. I do not know the exact number of tons, but

(Testimony of Capt. H. E. Stream.)

she had her bunkers full, and we had just cleaned off the deck and stowed it below. [81]

Q. Had a full water supply also? A. Yes, sir.

Q. Her coal and water made her deep in the water?

A. Yes, sir.

Q. She started on this particular voyage from Baldwin Island? A. Yes, sir.

Q. With a barge laden with rock for Aberdeen?

A. Grey's Harbor jetty.

Q. What barge was it and how many tons of rock did she have?

A. I do not know how many tons of rock, but I think it was the barge "Charger," if I remember right.

Q. She was towing with what length of cable astern? A. About 150 fathoms.

Q. And of this how much was manila hawser?

A. 120 fathoms of manila hawser.

Q. And thirty fathoms—

A. And thirty fathoms of chain and she had about 15 fathoms of chain, something like that.

Q. Thirty fathoms of wire rope, you mean?

A. Yes, sir.

Q. And then some chain?

A. Yes, sir, some chain. I do not know how much chain was out.

Q. What time did you leave Waldron Island?

A. We left Waldron Island at midnight.

Q. Some of the other testimony shows the time as one o'clock, would that be approximately correct?

A. One o'clock when we passed Turn Point, we



(Testimony of Capt. H. E. Stream.)

were under way then.

Q. Now, how was the water when you got under way? [82]      A. High water.

Q. So you were going out with an ebb tide?

A. Yes, sir.

Q. About what time did you pass Discovery Island light?      A. About four o'clock.

Q. This was on the 9th of June, 1909?

A. In the morning. I do not remember the exact time we passed Discovery Island.

Q. You could see the light on Discovery Island?

A. Yes, sir.

Q. And took your course from there?

A. Yes, sir.

Q. About what course would you proceed from that down until you passed Race Rocks? Do you remember what course you stood?

A. I think the "Sea Lion's" course was about southwest by south quarter south, something like that.

Q. When did the fog set in that morning?

A. About the time we passed Discovery; just after we got shaped on our course by Race Rocks.

Q. After the fog came on how did it continue?

A. Thick.

Q. A thick fog until after the collision?

A. Yes, for quite a while after the collision.

Q. What signals did you give as you proceeded on your course?

A. One long and two short blasts of the whistle.

Q. What intervals?      A. About a minute or less.

(Testimony of Capt. H. E. Stream.)

Q. Do you remember what time the collision occurred?

A. It was somewhere between 6:30 and 7. [83]

Q. You were on duty, were you? A. I was.

Q. On the bridge? A. In the pilot-house.

Q. The pilot-house is open in front?

A. All windows in front, yes.

Q. And a quartermaster at the wheel?

A. Yes, sir.

Q. Who was he?

A. A fellow by the name of Chris. Anderson I think was his name. Chris was the only name I really knew him by, but I think his other name was Anderson. We always called him Chris.

Q. You may state what occurred just prior to the collision and the first thing to call your attention to the presence of another vessel; just in your own way, state the facts.

A. We were coming down and I was trying to pick up the Race Rocks fog-signal, and I kept my signal going all the time at regular intervals as near as I could judge, and I was talking to the captain at the same time, Captain Lovejoy.

Q. Where was he?

A. In his bunk abaft the pilot-house, just a thin partition between us. We were talking about Race Rocks and trying to pick it up, and then I blew another whistle, and we were talking, and then I got the fog-whistle from the schooner.

Q. How did you know it was the schooner's whistle?

(Testimony of Capt. H. E. Stream.)

A. Because the fog-horn sounded like an air horn.

Q. What was that? A. Three blasts. [84]

Q. What did that signify to you?

A. A vessel running before the wind.

Q. What was the direction of the wind?

A. About southwest I should judge, a little forward on the starboard bow.

Q. Where did it appear?

A. A little forward of the beam.

Q. Where? A. On our starboard bow.

Q. And a little forward of the beam?

A. Yes, sir.

Q. Now, could you see at that time the vessel, when you first heard it? A. No, sir.

Q. When you first heard this fog-horn from the schooner what did you do?

A. I stopped and blowed my whistle and told Captain Lovejoy.

Q. What did you stop?

A. I stopped the engines.

Q. How did you do that?

A. By ringing two bells.

Q. You have a signal from the pilot-house to the engine-room, have you? A. Yes, sir.

Q. A signal to stop is given by two bells?

A. Yes, sir.

Q. You rang two bells to the engine-room?

A. Yes, sir.

Q. And at the same time what other signal did you give? A. I blew a tow signal. [85]

Q. Blew a tow whistle?

(Testimony of Capt. H. E. Stream.)

A. Yes, one long and two short whistles.

Q. How quickly was that done after hearing the fog-horn from the schooner?

A. Oh, just about as quick as a fellow could do it.

Q. Now, did the schooner respond?     A. He did.

Q. What response did he make?

A. He blew three blasts of the whistle.

Q. And when, with reference to that, did you see him loom out of the fog?

A. After he blowed two of his three whistles.

Q. Just as he was finishing the blasts you saw him loom out of the fog?     A. Yes, sir.

Q. Could you make out her position and course at that time?

A. No, I did not make out his course. I knew he was heading right for us, and still a little on our bow.

Q. You mean to say you could not make out the whole length of the ship?     A. No, I could not.

Q. You could make out enough to see that he was heading toward you?     A. Yes, sir.

Q. But not exactly what his course was?

A. No, I could not tell what his course was.

Q. Heading toward what part of your ship, apparently?     A. Well, just about amidships.

Q. What did you do then?

A. I backed her and put the wheel hard astarboard.

[86]

Q. After you gave your danger signal?

A. Yes, immediately.

Q. What else then did you do?

(Testimony of Capt. H. E. Stream.)

A. I went out of the pilot-house.

Q. No, but did you give the danger signal before you gave the signal to the engine-room to back?

A. No, sir, they were all done together. I had the left hand on the whistle cord and the right hand on the bell cord.

Q. And at the same time you gave your danger signal you gave the signal to go full speed astern?

A. Yes, sir.

Q. What was Captain Lovejoy doing in the meantime?

A. He was coming out of his room and took charge of the ship.

Q. Did he get out of his room before or after you gave these last signals?

A. Just as I gave them, he was coming through the door when I done so.

Q. Did you inform him what you had done?

A. I certainly did, yes, sir.

Q. Did you at any time change your helm?

A. I put my helm hard astarboard.

Q. When did you do that?

A. I blew my danger signal and I told the man at the wheel to put the wheel hard astarboard and I saw him do so.

Q. You saw him put it hard astarboard?

A. Yes, sir.

Q. As soon as you informed the captain that you had ordered to reverse full speed astern, what did you do? [87]



(Testimony of Capt. H. E. Stream.)

A. I went aft to see that the hawser was clear of the wheel.

Q. Was that your duty?

A. That was my duty to be there at the hawser.

Q. When the ship backs with a tow, after it overcomes its headway and commences to go astern, what danger is there from the tow-line?

A. Have the propeller pick up the hawser.

Q. And is that liable to break the propeller?

A. Stop the engines and make us helpless.

Q. So that it was necessary for you to be back there?     A. I had to avoid that.

Q. As soon as there was danger of fouling the line you called the captain's attention to it and went to see after it?     A. Yes, sir.

Q. Now, how did you proceed to go back?

A. Went over the top of the house and down over the bitts.

Q. I show you a photograph and ask you if that is the photograph of the "Sea Lion."     A. Yes, sir.

Q. That correctly shows the situation of the pilot-house and the other houses on the ship?

A. Yes, sir.

Q. This uppermost house, is this the pilot-house, and just behind it on the same floor is the captain's cabin?     A. Yes, sir; these are the two windows.

Q. Now, beneath that house, above the deck of the ship is what?

A. Is living-rooms and then the engine-room.

Q. The engine-room is aft?     A. Yes, sir. [88]

(Testimony of Capt. H. E. Stream.)

Q. And just in front of the engine-room is the engineer's room?

A. The engineer is on the starboard side.

Q. This picture is looking at the port side of the vessel?     A. Yes, sir.

Q. And you say you came out of your cabin door and went right back on the top?

A. The boat deck.

Q. Which is the top of the main house?

A. This is.

Q. Went back to the stern and jumped down on the bitts?     A. On the tow bitts.

Q. Did you see the line?     A. Yes, sir.

Q. In the meantime did you hear the signal given by the captain to go full speed ahead?     A. I did.

Q. Could you see the ship as you went back?

A. I did, yes, sir.

Q. Could you tell whether the collision was then inevitable, apparently?     A. Yes, sir.

Q. What did you conclude about that from the appearances?

A. I ran along on the port side and sung out to the cook and everybody that I seen, the cook was the only man that I seen, but I shouted loudly.

Q. What did you sing out?

A. Lookout, for the men to get out.

Q. You came to the front?

A. To the main house. [89]

Q. On to the starboard side?

A. Yes, on the forepart, on the starboard side.

Q. What occurred after that, go on and describe it.

(Testimony of Capt. H. E. Stream.)

A. Well, the vessel, came aboard, struck just abaft the smokestack and her bowsprit went across.

Q. The bowsprit of the schooner?

A. Yes, sir. Cut our starboard boat right in two.

Q. Struck your starboard boat just back of the smokestack? A. Yes, sir.

Q. The bowsprit extends about how far in front of the stem of the vessel?

A. On that vessel I should judge it would extend about 40 feet, I guess, from the end of the jibboom or stem, the martingales about half way between them.

Q. The first you saw the bowsprit struck the starboard boat and struck it off?

A. Cut right in two, clear to the keel, it did not cut the keel. Then it went into the port boat and shoved her off the davits, so her bow hung in the davits forward but her stern davits went out, that is broke both tackles.

Q. As the schooner kept coming closer, did the martingales come in contact with the side of the boat?

A. No, the martingale did not but the bobstays did.

Q. And did they scrape alongside?

A. They scraped alongside.

Q. About where did the stem strike your boat?

A. Well, abaft the house, between the house and the stern, about ten feet forward of the water-tank.

Q. The stem cut right into the starboard quarter of your ship twenty feet or something like that in front of the stern? [90]

A. Yes, sir, just about that.

(Testimony of Capt. H. E. Stream.)

Q. Now, about how far in front of the stem of the ship would the bobstays be, that first struck and scraped along the side of the ship?

A. That depends on the draught of the vessel.

Q. According to your best impression?

A. Well, the upper end of it was about 20 feet forward of the stem, and that went down just about three feet above the water.

Q. The bobstays go from the martingales down to the stem?

A. Right underneath the martingale, what is called the bowsprit of the vessel, and then what comes on top of that bowsprit is the jibboom, and the martingale is where the two meet on the bobstays made fast to the end of the bowsprit and goes down to the stem, and keeps the stays from lifting up, the sails from lifting up.

Q. Going back now to the time when you first saw the ship, what was your reason for ordering the helm hard astarboard?

A. To swing her head to port if I could.

Q. What was your reason for wanting to swing her bow, to port?

A. Well, I thought that the vessel would—

Q. You mean the schooner?

A. Yes, that he would swing up into the wind and I would go off before the wind as near as we could and we would strike a glancing blow if we struck.

Q. He was sailing before the wind?

A. Yes, sir.

Q. Which side were his sheets on? [91]



(Testimony of Capt. H. E. Stream.)

A. His sails were on the port side.

Q. Could he have made, in that short distance, any other maneuver than the one you figured on?

A. That is the only one I knew he could make.

Q. How would he do that?

A. Put his helm hard down.

Q. Put his helm hard down and swing into the wind? A. Yes, sir.

Q. In that way his sails would carry him around?

A. Yes, he would have to let go his head sails to do so.

Q. Did he do anything of the kind?

A. He did not, that I saw, at all.

Q. Well, you got aboard the schooner right afterwards. You could tell whether he let down any part of his sails or changed his course in any way by putting his helm hard down, if he had done so, could you not?

A. Well, after the collision, the only thing I could see the sails were all set but the fore and main topsails and the halyards were let go, they were hanging, that is the only thing; everything else was standing.

Q. About how far was the schooner away from you when she first loomed out of the fog?

A. Oh, about 200 feet, something like that. She was really close.

Q. Now, after the captain got into the pilot-house, as you went back, you were observing the ship approaching, were you? A. Yes, sir.

Q. By the time you heard the captain signal to go



(Testimony of Capt. H. E. Stream.)

full speed ahead, was the schooner's course and distance [92] such as to indicate that it would be impossible to clear the way you first figured on?

A. Yes, sir.

Q. What was the only chance then of avoiding the sinking of your vessel?

A. Get across his bows, that was the only thing.

Q. And that was the course adopted by the captain? A. Yes, sir.

Q. In view of the fact that the schooner hadn't time to come around, was that the proper course for the captain to take, would you have done the same thing if you had been in the pilot-house?

A. Certainly, that was the only thing he could have done. The tug had not lost headway at all from the backing.

Q. All the crew of your ship got aboard the schooner? A. Yes, sir.

Q. Climbed up?

A. By the bobstays on to the bow of the ship.

Q. Do you remember whether the captain or anyone on board the "Oceania Vance" called out to you or anyone aboard, to get aboard? A. Yes, sir.

Q. They could see how your boat was cut into better than you could on the boat? A. Yes, sir.

Q. And he wanted you to get aboard on account of the danger of your tug going down? A. Yes, sir.

Q. What happened after you got aboard the "Oceania Vance"?

A. Well, we went back and spoke to the barge.

(Testimony of Capt. H. E. Stream.)

Q. First she swung around and broke loose, did she?     A. Yes, sir.

Q. Then were her sails changed any?

A. Yes, sir, as she was swinging off to come before the wind.

Q. Did all of you turn to and help to swing over her sails?

A. Yes, sir. I don't know that everybody did, but I know some of us did; we done all we could.

Q. They were swung over into the wind so as to do what?

A. So as to bring her head off, let her head fall off before the wind and get way on the vessel.

Q. You swung her clear around?     A. Yes, sir.

Q. And came back to where the tug had been?

A. Yes, sir. And spoke to the barge.

Q. At that time had the tug sunk?     A. Yes, sir.

Q. By the time you got back?     A. Oh, yes.

Q. About how long were you swinging the tug around?

A. Why, I don't know just exactly the length of time, it took some few minutes.

Q. Were you out of sight of the tug before it went down?     A. Yes, sir.

Q. You were out of sight of her but did you—

A. We saw the barge afterwards, and then we saw wreckage of the tug.

Q. You swung around and then picked up the barge?     A. Yes, sir. [94]

Q. After *haining* the barge you found then that the tug had sunk?     A. Yes, sir.

(Testimony of Capt. H. E. Stream.)

Q. And you left instructions with the barge to hang on to the hawser to the tug?     A. Yes, sir.

Q. The tug acted at the bottom of the sea as an anchor for the barge?     A. Yes, sir.

Q. And then you and the rest of the crew of the "Sea Lion" came on with the schooner to Port Townsend?     A. Yes, sir.

Q. Did you learn from the captain or officers of the "Oceania Vance," what they had done previous to the time of the collision?

A. Well, he told me coming up the straits, but I don't recollect exactly what it was, I would not swear to what he said.

Q. Do you remember his telling you how long previous to that that he had worn ship on their course to Dungeness?

A. After picking up Race Rocks, before they shaped their course for Dungeness, about 20 minutes, he said.

Q. Did he tell you about what speed they were going at the time of the collision or just immediately before it?

A. He said three and a half or four, if I remember right. I would not say as to that.

Q. Did you notice what speed they were going when you left after the collision, while the fog was still on?

A. No, I did not. I should judge they were making between four and five. [95]

Q. Afterwards?     A. Yes, sir.

Mr. HUGHES.—I offer this photograph of the

(Testimony of Capt. H. E. Stream.)

"Sea Lion," identified by the witness, in evidence.

Photograph marked Libelant's Exhibit "B," filed and returned herewith.

Q. I show you Libelant's Exhibit "A," and the line "B"—"C" as indicated here by Captain Lovejoy, showing the course from Discovery Island to point of collision, is that about correct?

A. That is just about correct.

Q. The letter "B," would that in your judgment be about the location or place in the water where the collision occurred?     A. Just about that.

Cross-examination.

Q. (Mr. TRUMBULL.) I understand, Captain, it was your watch at the time this collision occurred.

A. Yes, sir.

Q. Prior to the collision you heard fog-signals from the schooner?

A. Within a minute or so of the collision.

Q. Had not you heard any prior to that?

A. None at all.

Q. How many signals did you hear?     A. Two.

Q. That is two separate and distinct signals?

A. Yes, two separate and distinct signals.

Q. These signals consisted of what? [96]

A. Three blasts of the whistle with his fog-horn.

Q. These indicated to you what?

A. That the vessel was running before the wind.

Q. How far were these signals apart?

A. Well, about far enough that I could get in a blast of my whistle.

Q. For you to give your signal?     A. Yes, sir.

(Testimony of Capt. H. E. Stream.)

Q. Which consisted of what?

A. One long blast and two short.

Q. That indicated what?     A. That I had a tow.

Q. Now, when was it that you signaled to stop the engine?     A. When I first heard his.

Q. The first signal?

A. The first signal that I heard.

Q. And how long was it after that that you saw the schooner?

A. Well, I would not say the exact time, but a very short time, because I blew my tow whistle and he answered right away, and then I seen him as he was blowing his whistle.

Q. Well, that would be about a minute or a minute and a half.

A. Oh, no; it would not be a half a minute.

Q. Not a half a minute?     A. No.

Q. Well, now, did you stop the engine before or just after you saw the schooner?

A. Before I saw the schooner. [97]

Q. When you saw the schooner what did you do?

A. I blew the danger signal, put my helm hard astarboard and backed her at the same time.

Q. Gave the signal to back the engine?

A. Yes, sir.

Q. Then what did you do?

A. Well, Captain Lovejoy came into the pilot-house at that time and relieved me and I went aft to look out for the hawser.

Q. How long did it take you to go back?

A. It did not take me very long.



(Testimony of Capt. H. E. Stream.)

Q. Could you tell me about how long?

A. As to minutes or seconds I never timed myself; I went as fast as I could.

Q. You went over the top of the deck-house?

A. Yes, sir.

Q. How did you get up there?

A. I was in the pilot-house.

Q. Can you go out of the pilot-house?

A. Out of the pilot-house, there is a railing around here and I ran aft here and jumped down on the bitts here.

Q. Then what happened after you got there?

A. What do you mean?

Q. In regard to the engines?

A. They were going full speed ahead, and then just as I left, as Captain Lovejoy stuck his head out of the pilot-house window, I went out of the door, and he told me what he had done, he rang the full speed ahead.

Q. He changed it? [98] A. Yes, sir.

Q. Almost instantly?

A. Yes. The three different signals were almost together.

Q. One right after the other?

A. Yes, sir, almost as fast as a man can work his engine.

Q. Well, you had seen the schooner before you left the pilot-house? A. Yes, sir.

Q. And did you see the schooner again before the collision? A. Yes, sir.

Q. Where did you see her?

(Testimony of Capt. H. E. Stream.)

A. I saw her come aboard of us; I was standing forward looking at her, forward on the deck.

Q. After you had gone to the stern?

A. Yes, sir.

Q. And came back?

A. Yes, sir, I came forward.

Q. You came forward again and you had seen the schooner coming toward the tug?

A. Yes, sir, she was coming from the time I seen her, she was coming toward the tug. As I ran forward on the port side I could see her bowsprit over, and the reason I ran forward was to keep away of the smokestack.

Q. These changes of the engine had they made any difference in the speed of the tug?

A. Might have slowed down a little, but I do not know whether they had or not. I know the tug had slowed a little, but she had not gone very much. She was still going ahead.

Q. The tug was going ahead and the schooner was coming [99] toward the tug. A. Yes, sir.

Q. Now, when you saw the schooner first, she was about 200 feet away? A. About that, yes.

Q. And your idea was by stoppnig your engine and then reversing the engine, was to avoid her?

A. Yes, sir.

Q. If it had been continually reversed, would it have avoided her? A. No.

Q. Why not?

A. Because he did not change his course; we could not stop the way of the vessel at the time she would be reached.

(Testimony of Capt. H. E. Stream.)

Q. Were these proceedings on your part to stop the engines and reverse the engines on the assumption that the captain of the schooner would change the course of his vessel? A. Certainly.

Q. Based on that? A. At that time.

Q. If you had known that he was not going to change his course, what would you have done?

A. I certainly would have rung full speed and probably would have cut the hawser to give her a chance to get away.

Q. Now, this schooner, when you saw her first, had her sails all up except the topsails?

A. The fore and main topsails, I noticed them after the collision. I don't know what was up before, because [100] I did not take time to see, her bowsprit came out of the fog, her bow came out of the fog, and what was above I did not notice.

Q. Well, now, what would the captain of the schooner have done with a vessel that close to each other and getting closer to each other every second, to have changed the results?

A. Well, I don't know what he could have done. I know what he could have tried to have done.

Q. What in your opinion would you have tried to have done?

A. Put my helm down and let her come into the wind, put all hands on the spanker-sheet so as to haul her around.

Q. How long would it have taken to have done that?

A. That would have taken sometime, her sails are heavy sails.

(Testimony of Capt. H. E. Stream.)

Q. Is it not a fact, Captain, that assuming that you were 200 feet apart, and both of the vessels going that that distance would be covered in a very few seconds?     A. Yes, sir.

Q. So that it is not probable that anything could have been accomplished in that distance?

A. Well, I don't know whether it could or not.

Q. Well, as a sailor, what would be your opinion?

A. Well, I would have tried to clear whether she would have cleared or not I don't know. I am not a schooner man, I am not a sailor, I am a steamboat man; sailing vessels are out of my line; I am a steamboat man.

Q. I thought you were in charge of a whaler now?

A. Yes, a steam whaler. I have made a few trips to sea in sailing vessels, one was in the "Oceania Vance" after the collision. I never handled a sailing vessel to [101] know what they can do.

Q. This was quite a thick fog was it not?

A. Very foggy.

Q. And was there much of a wind?

A. Quite a breeze of wind.

Q. Which way was it blowing from?

A. About southwest.

Q. How long was it after that before the fog lifted?

A. The fog lifted along about one or two o'clock in the afternoon, something like that.

Redirect Examination.

Q. (Mr. HUGHES.) How were her sails set when you were aboard the ship?



(Testimony of Capt. H. E. Stream.)

A. You mean which side they were on?

Q. Yes.      A. They were on the port side.

Q. And if she was sailing before the wind, when she had shaped a course after passing Race Rocks for Dungeness, about what course would that be?

A. That would be about—

Q. About southeast?

A. It would be more to the eastward, about east by south.

Q. She would have to have her sails pretty well on the port side in order to get the full benefit of the wind?      A. Yes, sir.

Q. And with her sails in that position, she would put her helm hard aport and that would bring her around with the wind as it was?

A. No. He would have to get her spanker in before she [102] would have gone very far; after she got around so far she would spill on the spanker, and the weight of the sails would have kept her there, but if he could have got the spanker in and sheeted home, as they call it and let go the head sails, she would have come around herself.

Q. Putting the wheel hard down?

A. Yes, sir, she would have come to a certain distance, but beyond that she would not have come with the sheets and sails in the position that they were.

Q. And by putting your wheel hard astarboard, putting your helm to port, while making headway, how would it throw the bow?

A. Throw the bow to port.

Q. So that it would be throwing your ship away from him all the time as he was coming?



(Testimony of Capt. H. E. Stream.)

A. Yes, sir.

Q. And that was your idea in making that man-euver, from what you could see, as you first saw the bow appear out of the fog?     A. Yes, sir.

Q. You thought that the distance was sufficient so that you could keep out of his way and the most that would happen would be that the two ships would bump each other at the most?     A. Yes, sir.

Q. And where were you on the ship when you heard the captain give the signal "Full speed ahead"?

A. I was just about at the aft part of the pilot-house.

Q. Walking back?     [103]

A. Running back.

Q. Somewhere on the aft part of the deck?

A. On the aft part of the pilot-house. I had not much more than got out of the door and slammed the door and was running back.

Q. Did you notice the ship, was it fuller in sight, fuller in view at that time?     A. Yes, sir.

Q. And her position was better defined?

A. Yes, sir.

Q. So that you could tell what she was doing

A. Yes, sir.

Q. (Mr. TRUMBULL.) About what speed were you making?

A. We were making about four or four and a half, something like that.

Q. (Mr. HUGHES.) That was the speed you were making during the fog, was it?     A. Yes, sir.

(Testimony of Capt. H. E. Stream.)

Q. Now, considering the condition of the tides and currents there, could you keep your tow in position at a slower speed than that?     A. No.

Q. You were running then as slowly—

A. As slowly as we could make our course, certainly.

(Testimony of witness closed.)

Hearing adjourned. [104]

Seattle, Washington, May 6, 1912.

PRESENT: Mr. HUGHES, for the Libelant.

Mr. TRUMBULL, for the Claimant.

**[Testimony of Christian Anderson, for Libelant.]**

CHRISTIAN ANDERSON, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HUGHES.) You are a seafaring man, Mr. Anderson?     A. Yes, sir.

Q. How long have you been a seafaring man?

A. Forty-one years.

Q. Were you the quartermaster on the tug "Sea Lion" on the 9th of June, 1909?     A. Yes, sir.

Q. When did you go on duty?

A. Six o'clock, sir, in the morning.

Q. What was the condition of the weather at that time?

A. Oh, kind of foggy, blowing a strong breeze.

Q. Was the fog dense?

A. Yes, it was getting thick all the time; it was very thick after while.

Q. Who was in command in the wheel-house with you?

(Testimony of Christian Anderson.)

A. The mate was in command just then, Mr. Stream, I think his name is.

Q. The captain's cabin was immediately behind the pilot-house? A. Yes, sir.

Q. Were the windows of the pilot-house open after you came on deck and up to the time of the collision?

A. When I came in I opened the windows just about 10 minutes or so afterwards. When I saw what kind of weather it was I opened the windows.

[105]

Q. They remained open all the time after that?

A. Right to the collision.

Q. For how long, for a half an hour?

A. Just about half an hour. I could not say exactly.

Q. Do you know when the collision did occur?

A. It was twenty minutes of seven when I left the pilot-house.

Q. What signals was the "Sea Lion" giving?

A. She was blowing one long and two short.

Q. How frequently?

A. It was very often. It might be a minute or two at the time, she was going continually pretty near all the time blowing a whistle, I should judge a minute or two.

Q. Blowing one long and two short whistles?

A. Yes, sir.

Q. Did you finally hear a fog-horn from some other vessel? A. Yes—not from other vessels—

Q. I mean outside of your ship, did you hear a fog-horn before the collision?

(Testimony of Christian Anderson.)

A. We heard a sailing ship on the starboard side.

Q. Forward of the beam was it, on the starboard bow?     A. Yes, a little forward of the beam.

Q. At that time you could not see the ship that gave that signal?     A. No, sir.

Q. Did the mate answer it?

A. He answered immediately.

Q. What else did he do?

A. Well, he blowed his horn again, the schooner did, then the jibboom was right over our engine-house.

Q. At the time he blowed the second time he was close to [106] you?     A. Yes, right on to us.

Q. Going back to when you first heard his fog signal, that first signal of the "Oceania Vance," what did the mate command you to do?

A. To put the wheel over.

Q. How, starboard?

A. Starboard, I think it was, so far as I can remember I think it was starboard.

Q. Did you put it over?

A. I done all I could to get it over, but they smashed together before we were through, there was no time to spare there.

Q. Did the captain come into the pilot-house?

A. He was in the pilot-house before they went together. The door was open and he heard the trouble—

Q. He came right into the pilot-house?

A. Yes, sir.

Q. He took command, did he?

(Testimony of Christian Anderson.)

A. Well, he was, he took command, but it was just a short time.

Q. The mate went out, didn't he?

A. Well, the mate went out first and then the captain followed him, because it was no place to be there.

Q. You stayed at the wheel?

A. I stayed there until I saw the captain and the mate jump on the schooner.

Q. Did you keep the wheel hard over as long as you stayed there?

A. I kept it over, that was my order. [107]

Q. Then after they had gone, did you hear them call from the "Oceania Vance," to get over?

A. I dare say. I could not say I heard it, because I was making up my mind whether to leave the wheel; there was nobody to give me orders *to* I left it.

Q. You went out?

A. I went out and saw them climbing up the bob-stays and chain plates, and they were helping all they could to get them up aboard.

Q. Were you one of the last men to get aboard?

A. I was next to the last. When I passed the engine-house I sung out for the second engineer to come.

Q. He followed you?

A. He asked me if I was in a hurry, and I says if you want to save yourself you better come. He was just behind me.

Q. Now, when you first noticed the "Oceania Vance," was she getting pretty close to you?

A. She was too close.



(Testimony of Christian Anderson.)

Q. Was there anybody on the lookout on her?

A. Not that I could see. There might have been, but I do not think there had been any. I could not see any. They might have jumped down; it was too close then to see.

Q. You have had a good deal of experience on sailing vessels, have you?

A. Yes, sir, I should say so.

Q. You have commanded sailing vessels as master yourself?

A. I have been master of square rigged vessels for over 14 years, all around the world.

Q. What rate of speed was the "Oceania Vance" sailing when you saw her coming to you? [108]

A. Well, the weather was blowing, she had the top-sails on and no ballast, and I should think she was going about seven or eight miles an hour, I should judge so. During the day *the died* down after the collision; but at the time of the collision it was a pretty strong breeze.

Q. The wind died out afterwards?

A. Yes, gradually.

Q. Up to that time the wind was blowing quite a breeze? A. Quite a strong breeze.

Q. And what direction was it coming on, your bow? A. Coming on our starboard bow a little.

Q. What was your course?

A. I think, so far as I remember, it was southwest by south a little southerly, may be half a point; I could not say for sure, but it was a little southerly.

(Testimony of Christian Anderson.)

Cross-examination.

Q. (Mr. TRUMBULL.) How long had you been on watch that morning, Mr. Anderson?

A. From six o'clock, sir, in the morning.

Q. How long after you went on watch did this collision occur?

A. Just when I left it was 20 minutes to seven in the pilot-house.

Q. How did you come to notice that?

A. I noticed that because the clock was hanging right before me, and I knew there would be a question about it, so I looked at it.

Q. You knew there would be a question?

A. Yes, sir.

Q. Why did you think so? [109]

A. I have been to sea all my life and have been on trials like this before.

Q. You thought there would be some trial?

A. There would be.

Q. So you determined to post yourself?

A. Well, I would see the time. You see there was very little time to look after things then.

Q. Well, when you went on watch then the "Sea Lion" was blowing her fog-whistle?

A. All the time; just a little between.

Q. Could you hear the fog-signal from the "Oceania Vance"?

A. No, sir, did not hear it until just before, just a very short time before they struck, I heard one.

Q. How long before?

A. Well, it was not much, I could not say exactly,

(Testimony of Christian Anderson.)

but it could not be more than a couple of minutes.

Q. A couple of minutes?

A. It was very little. When the second one blew the jibboom was right over us.

Q. Now, you were in the pilot-house looking out of the window? A. Yes, sir.

Q. How long before the collision did you see the "Oceania Vance"?

A. Oh, there was very little; it was so thick you could not, I don't think you could see 150—well, about 40 fathoms something like that. It was very thick. You could hardly cut it with a knife, it was so thick.

Q. You think that when you saw the "Oceania Vance" she was about how far from you?

A. They were very little, a short distance, right close to [110] us.

Q. Well, was she blowing her whistle?

A. We heard one blow and the second blow was right on top of us.

Q. What did you do when you seen her?

A. Well, I took my orders from the mate.

Q. What orders did the mate give you?

A. To put the wheel over.

Q. Which way? A. I put it to starboard.

Q. Do you remember that you put it to starboard?

A. So far as I remember, I had to; I have been on this trial once before, and I am almost certain I said the very same thing there. That is three years now; it is a long time, and I forget a little about it, but I am almost sure. It was the only way we could clear it.

(Testimony of Christian Anderson.)

Q. What other orders did the mate give you?

A. Well, the mate did not give me any. The captain was there and they did not give me any other orders; they went and left me.

Q. The captain came into the pilot-house?

A. He was there when the vessel came.

Q. And was the mate in the pilot-house?

A. The mate was there before, you know.

Q. After he gave you the order to put the wheel over, what did he do then?

A. Well, I had it over as quick as I could.

Q. What did the mate do?

A. He left the pilot-house.

Q. What did the captain do? [111]

A. He went after him, because they struck together and there was no time to stop there.

Q. Went right out?

A. Yes. The mate gave a signal to the engineer, but I do not know about that; I was hauling the wheel over.

Q. You do not know what signal he gave?

A. No, but we were going with slow speed; when we were traveling before the collision we slowed down.

Q. And neither the mate nor the captain were in the pilot-house?

A. No, they were in the house and went down over the house and took hold of the chain plates on the schooner and went up, and when I saw them I made up my mind there was nothing nor nobody to give me orders, and I left.

(Testimony of Christian Anderson.)

Q. Well, Mr. Anderson, the collision then occurred almost within a few seconds after the time that you saw the schooner come up out of the fog?

A. Yes, I could almost swear it was within three or four minutes, three minutes.

Q. Do you mean minutes or seconds?

A. Minutes. It could not be three minutes. It was done in no time.

Q. Do you realize how much time three minutes is?

A. Well, in a condition like that, it was a very short time.

Q. Well, you stated that the schooner was going seven or eight miles an hour?

A. There was no ballast in that schooner and there was a strong breeze.

Q. How do you know how fast she was going?

A. Well, I cannot say for sure, but if I had seen a log I [112] could tell.

Q. Why do you think so?

A. On account of the wind, it was a strong breeze, and she had all her sails on.

Q. All of the sails? A. Yes, the topsails, too.

Q. All were up? A. Yes, sir.

Q. You are sure of that?

A. Yes. I am not sure about the foretopsail, but the mizzen and maintopsail were on.

Q. When did you notice that?

A. After I got on board.

Q. You formed your opinion then as to how fast she was going after you got on board the vessel and seen the sails she had?



(Testimony of Christian Anderson.)

A. I could form that in a minute, before I left the "Sea Lion" I called the engineer up to come, and I looked out at it then; I was by the engine-house and I sung out for the second engineer to come up if he wanted to be saved, and I was looking at the wind just then, and I told him, "If you don't come now you will be gone,"—to hurry up. He asked if I was in a hurry and I said yes. Then I hooked on the bobstays over the house and I had the engineer just behind me.

Q. And that is the only reason why you thought it was going seven or eight miles an hour?

A. I am almost certain she was going seven.

Q. What do you mean by almost certain, what do you base it on? You did not see her go? [113]

A. Well, she was coming with the wind full speed, and I have been to sea forty-one years, and I ought to be able to say just about how *much will* go. I have been to sea all my life.

Q. But she was within about 200 feet when you saw her, and she was coming through a thick fog.

A. Yes, sir.

Q. And the wind had died down.

A. No, not just then, but the wind died down, but not sudden.

Q. So you formed an opinion as to how fast she was going after you got on the schooner and she started on toward Port Townsend?

A. Well, I formed my opinion before I left the "Sea Lion"; I was looking at the "Sea Lion" to see if she was going down, and I saw she was going down

(Testimony of Christian Anderson.)

sideways, and I looked at the wind and weather, and I said that schooner was coming with good speed, a little too good speed, in my opinion, for the foggy weather.

Q. You said that to yourself, did you?

A. Yes, sir.

Q. You remember that you said that?

A. I was thinking of that. I never said the words, you know.

Q. But you remember that you were thinking of that at that time? A. Yes, I was thinking of it.

Q. And at that time you made up your mind that she was going seven or eight miles an hour.

A. Between seven and eight I should guess. I am not far out there. [114]

Redirect Examination.

Q. (Mr. HUGHES.) About how hard would you say the wind was blowing?

A. I could not say that, how hard it was blowing. I never had any experience to measure the wind that way, but I know if I had been in my boat I could not pull it up with two oars, there would have to be two men to pull against that wind, I mean in a small boat, to pull against it.

Q. Pretty strong wind?

A. Strong wind to be in there.

(Testimony of witness closed.) [115]

**[Testimony of Capt. Charles Roos, for Libelant.]**

Capt. CHARLES ROOS, a witness called on behalf of the libelant being duly sworn, testified as follows:

Q. (Mr. HUGHES.) You are a master mariner?

A. Yes, sir.

Q. How long have you been a master mariner?

A. Well, for some thirty odd years.

Q. You have retired now and live in Seattle?

A. Yes, sir.

Q. Have you commanded sailing vessels on this coast for many years?      A. Yes, sir.

Q. How long?      A. Since 1882.

Q. And did you ever command a three-masted schooner similar to the "Oceania Vance"?

A. Yes, sir, I have had three and four masted schooners.

Q. On the morning of the 9th of June, 1909, the "Oceania Vance" was sailing up the straits toward Port Townsend; the wind was about southwest, quite a strong breeze, and there was a dense fog; she had tacked across until she had gone to a point eastward or northwestward of Race Rocks, and then changed her course toward Dingeness light or Point Wilson; sailing before the wind with all sails set, except perhaps her foretopsail; the tug "Sea Lion" was proceeding down the straits past Discovery Island, on a course southwest by south a quarter south, or thereabouts, to pass Race Rocks, and was a mile or thereabouts to the east of Race Rocks; she was towing a barge laden with stone. There was a dense fog.

(Testimony of Capt. Charles Roos.)

She was giving her fog-signals one long and two short blasts, which might be heard on the [116] "Oceania Vance."

A. How did they know it could be heard on the "Oceania Vance"? She was to windward, you know. Sometimes a steamer blowing a whistle to leeward you cannot very well hear the sound.

Q. That is true, but the captain of the "Oceania Vance" said he heard her for ten or fifteen minutes.

A. Oh, well, then.

Q. The "Sea Lion" continues her course, which would cross the course of the "Oceania Vance." And the "Oceania Vance" gave a fog-signal from her fog-horn, a short time, say when she was 200 feet or more distance from the "Sea Lion." I will ask you to state, Captain, under these circumstances what would be the duty of the master of the "Oceania Vance" when hearing the fog-signal of a tug with a tow continuing to be sounded ahead of him, in front of his course, not being able to see her.

Mr. TRUMBULL.—I object to the question—

Q. And what would be the proper seamanship for the master of the "Oceania Vance" in operating that ship?

Mr. TRUMBULL.—I object to the question for the reason, first that it assumes a state of facts which the evidence does not support. Second, that it calls for a conclusion of the witness, which virtually would involve the determination of the case, and calls for a legal conclusion.

Q. Now, you may answer what would be proper seamanship for the master of the "Oceania Vance"



(Testimony of Capt. Charles Roos.)

under the circumstances that I have stated?

A. Well, according to the rules of the road, when two vessels meet, and you cannot tell in a fog whether they are meeting [117] or whether they are crossing one another's bow, that it says that the vessels' helms should be put port to port. Of course, if the steamer being ahead and seeing the schooner, if he put the wheel to port he would have run into the schooner, and the schooner running with the wind on the quarter, he might have to put his helm down and stop his headway and fetch the two vessels alongside of one another, and the schooner on account of not being able to back, but the steamer could back or else go ahead by putting her wheel to starboard, he could go clear of the schooner, putting the helm to port, he would have stopped the headway altogether and they could come side by side.

Q. By putting the helm to port he would swing her around into the wind.

A. Come right up to the wind and stop the headway.

Q. Now, Captain, if you were sailing a vessel like the "Oceania Vance," and you heard the signals, fog-signals of a tug with a tow, and they continued to approach you or so as to appear to be right ahead of you, and crossing your course, when they got very close, but you could not see them, and you were sailing with all sails set except the foretopsail, if you found him getting close to you, what would you do?

MR. TRUMBULL.—I object on the ground that it is incompetent and immaterial; don't call for any fact



(Testimony of Capt. Charles Roos.)

and calls for the opinion of this witness as to what he would do.

Q. What would you do under these circumstances, what would be proper seamanship?

A. Proper seamanship would be to put my helm down. [118]

Q. Why?

A. Because, that would stop me headway altogether and avoid the collision as much as possible. They might have come together but they would not have come together with the force as if I had kept on my course.

Q. Is that the only way that you could have stopped the headway of your ship?

A. That is the only way I could, by luffing her up; by jibing her I would have increased the headway and it would take so much more time to jibe a vessel than to come up, because of the sails and the wind steady helps her to come to any place where you have put the helm. If you have all the sails braced it takes so much longer to jibe her than it does to have a vessel to come up.

Q. Into the wind you mean?

A. Yes, sir. And by going before the wind. The more I go before the wind the faster I go, but by putting the helm down I come up into the wind and it stops the headway.

Q. Having your sails all on the port side and the wind blowing on your starboard quarter, if you put your helm hard aport or put it down as you put it, it would bring the head of the ship around?

A. Sure, yes.

(Testimony of Capt. Charles Roos.)

Q. Into the wind?

A. And stop your headway as much as possible. It might not stop it altogether, but it would slow it down so much, it would not get ahead hardly at all except the tide would take her, that is the only thing.

Q. Now, the "Oceania Vance" is a three master schooner, [119] about 150 feet in length, in what distance, suppose she was going before the wind at a speed of say seven knots an hour, in what distance could she swing around into the wind so as to prevent a collision that would cause any injury to the tug-boat?

Mr. TRUMBULL.—I object for the reason the witness is not shown qualified to answer the question.

Q. Let me put it this way: Suppose she was running free with all sails set except the foretopsail, and the wind on her starboard quarter, in what distance could she be brought around with her bow to the wind sufficiently to strike broadside if she struck at all the vessel ahead of her?

Mr. TRUMBULL.—I object as incompetent, the witness is not shown to be qualified to answer that question.

A. I say she would not take half the length of the vessel to fetch her to pretty near a standstill, anyhow to fetch her around—say she was going east or east by north, now, I would fetch her up to southeast in half a length of her. And, of course, it would take perhaps a little longer if the course up was close to the wind and she don't come up as fast as when she comes from the east to southeast, of course, then she would lose her headway and she don't come too as fast

(Testimony of Capt. Charles Roos.)

as when she was going full speed. As soon as she gets a different speed, so that the sails don't draw, consequently she gets by the wind and the sails will shake, and that will stop the headway; after she gets up in the wind the headway is stopped altogether. [119½]

Cross-examination.

Q. (Mr. TRUMBULL.) Suppose, Captain, that you were on this "Oceania Vance," and you discovered a tug coming toward you at a distance of 150 to 200 feet in the fog, what steps would you take?

A. How do you mean what steps?

Q. What would you do?

A. Well, when I heard her whistle I cannot tell.

Q. I did not ask you that Captain, supposing you saw the tug coming toward you and you were going toward the tug and the tug lay across your course, and when you perceive the tug you were somewhere between 150 and 200 feet apart, what would you do?

A. Well, if I can see the tug, and I see I cannot clear him, the only way I can do is to keep the helm to port, that is the rules of the road.

Q. Yes.

A. Now, it says if two vessels meet head on, to avoid a collision the helm should be put to port. But here is a tug-boat going pretty near in the same direction as I am. I am coming before the wind and he is heading right up into the wind, and we are coming pretty near bow on, he is trying to cross my bow. Now, to avoid collision, he is blowing his signals that he has a tow behind. I know if I put my helm up I either run into the steamer or into the tow, and to

(Testimony of Capt. Charles Roos.)

avoid that I put my helm hard aport to get my vessel up into the wind.

Q. Now, you are testifying as to your understanding of the rules of the road? A. Yes, sir. [120]

Q. Now, I ask you what you would do as a sailor, as a seaman without regard to the rules of the road, and your understanding of the rules of the road, state what you would do.

A. That is what I would do, that is the only safe way.

Q. Well, then, you run the risk of the tug striking you amidships? A. No, sir.

Q. Why not?

A. The tug could not strike you amidships, because the further I come up to the wind the further I would get away from the tug; he could not strike me amidship. He is going this way and I am coming right off by putting my helm hard aport, I am coming up in the wind, we are both going the same way, by him putting the helm to port he would run into me, deliberately run into me.

Q. Well, now, you say then that doing that, putting your helm hard aport and bringing you up to the wind, that that could all be accomplished in going less than the length of the vessel?

A. Yes, sir, it can be with speed—I do not know what speed she was going.

Q. Mr. Hughes, when he gave you the question, assumed that she was going seven or eight miles an hour.

Q. And the tug is going four or five miles an hour?

A. Yes, sir.



(Testimony of Capt. Charles Roos.)

Q. That could be accomplished under these conditions?     A. Yes, it can.

Q. Did you ever accomplish it?

A. Well, I have had lots of narrow escapes.     [121]

Q. Did you ever do that?

A. Yes, I could do it.

Q. Did you ever do it?

A. Yes, I have done it, tacking ship so many times. I know how long it takes for a schooner to come around.

Q. But have you ever done anything like what you have described, Captain, where you are in danger of colliding with a tug?

A. Why, no, I never had experience in colliding with a tug, but with other vessels. Of course, we never get in any position like that with a tug as a rule. Lots of times I have had that experience with other ships.

Q. The tug usually keeps out of the way?

A. Yes, most of the time. In San Francisco Bay in olden times, when I first commenced to sail there, we did not have any tugs, and we would have perhaps twenty or twenty-five vessels going out at one time, and you have all kinds of experience. Of course, there was a lot of rivalry and we would want to show who had the best vessel to beat out through the heads of San Francisco.

Q. These were all sailing vessels.

A. Yes. Of course, with a steamer, he is supposed to keep out of the way of sailing vessels, but circumstances alter cases.

Q. What are you doing now, Captain?



(Testimony of Capt. Charles Roos.)

A. I am not doing anything just at present.

Q. You are not working for any one?

A. No, sir.

Q. Who have you been working for?

A. Well, the last I worked for the Globe Navigation Co. [122]

Q. How long has it been since you were working?

A. About four years.

(Testimony of witness closed.) [123]

**[Testimony of James F. Primrose, for Libellant.]**

JAMES F. PRIMROSE, a witness called on behalf of the libellant being duly sworn, testified as follows:

Q. (Mr. HUGHES.) You are an engineer of tug-boats for the Puget Sound Tug-boat Company?

A. Yes, sir.

Q. Did you help in trying to raise the tug "Sea Lion"? A. Yes, sir.

Q. You were how long at work there?

A. Well, my recollection was three days, three or four days.

Q. You have been through those waters a great deal?

A. Yes, back and forth through there for several years.

Q. You have been port superintendent also?

A. Yes, I am at the present time, and was at that time.

Q. You are familiar with the tidal currents up around Race Rocks, between Discovery Island and Race Rocks?

(Testimony of James F. Primrose.)

A. Yes, sir, somewhat familiar with them towed through them for several years.

Q. Were you familiar with the "Sea Lion"?

A. I never was engineer on the "Sea Lion."

Q. But you were familiar with her?

A. Yes, I am familiar with her; she has been under my supervision. I have rode on her several times in the performance of my duty.

Q. Now, what are the currents in the straits out there around Race Rocks and between Discovery Island and Race Rocks?

Mr. TRUMBULL.—It does not seem to me that that is the best evidence, and I object to it as not the best evidence. Mr. Primrose is not shown to be competent to testify.

Mr. HUGHES.—The best evidence, of course, would be the currents themselves, but being unable to introduce them in evidence, I offer in evidence the testimony of a man [124] who has frequently observed them and is familiar with them. Will you answer my question?

Mr. TRUMBULL.—Add this to my objection that the official chart of the currents is the best evidence of what the currents are.

A. Well, the tide runs pretty strong there, out in that locality, and it is full of tide-rips all the way, you take it for a distance between Race Rocks and Discovery Island there are lots of tide-rips, and the tide runs there all the way from four to seven knots.

Q. Now, Captain, the tug "Sea Lion" was pretty heavily laden and with a hawser say at 150 fathoms,

(Testimony of James F. Primrose.)

what rate of speed would she have to make in a fog to handle her tow in these currents? What would be the rate of speed that she would have to make for her safety, to keep her course? Her own safety and the safety of her tow, I mean?

Mr. TRUMBULL.—I object as incompetent, the witness has not been shown competent to testify.

A. Well, I should say about four or five knots, that is to maintain her course through a locality that is full of tide-rips, etc.

Q. What is the effect of these tide-rips upon the tow?

A. Well, the tug, of course, will get into the rip first, and she realizes the rip is there, and the tow will come into it next, now, if you are not maintaining a speed you will not be able to pull through, you will follow along the rip that is the effect of it.

[125]

Cross-examination.

Q. (Mr. TRUMBULL.) Mr. Primrose, do you know whether there were any tide-rips where this collision occurred? A. Yes, sir.

Q. You do know? A. Yes, sir.

Q. Were there any? A. Yes, sir.

Q. When were you there?

A. The day after the "Sea Lion" sunk.

Q. Do you know in what depth of water the tug-boat was sunk? A. Yes, sir.

Q. What depth of water? A. 74 fathoms.

Q. What time of the day were you there?

A. Well, as near as I can remember, we arrived

(Testimony of James F. Primrose.)

there about seven o'clock in the morning of the next day.

Q. How long did you stay?

A. Three or four days, I have forgotten just the number, without looking it up.

Q. Did you observe the currents?

A. Well, I say it is a strong current.

Q. Well, what do you mean by that, stronger than it is in other places?

A. Not stronger than in other places, but stronger than it is in any other locality right around there. Strong currents there and up toward Discovery Island.

Q. Are these currents strong all the time or does it depend upon the condition of the tide? [126]

A. It will depend on the condition of the tide, whether a long or short run; a short run it will run from four to seven knots, and slack water not to exceed thirty minutes down to twenty minutes. I was drawing a sweep over the vessel, and if I worked on slack water and I had to work awful quick, and that is how I came to learn that.

Q. Are these rips there all the time or only at certain conditions of the tide?

A. Certain conditions of the tide.

Redirect Examination.

Q. (Mr. HUGHES.) Why did you have to work on slack water?

A. On account of the boat's position.

Q. On account of the tides and rips?

A. Yes; I had the "Tyee" fast to the "Sea Lion"

(Testimony of James F. Primrose.)

on the other end of the hawser; took the hawser off the barge she was towing and made it fast to the "Tyee," and, of course, the "Tyee" served as my buoy. Well, then, in order to sweep her I had to have my sweep with a boat on each end of it, and I would go either to the eastward or to the westward and sweep with the tide, you see, as it started to come. Otherwise I could not hold the boat in position and sweep against the tide. Of course, my sweep would never go to the bottom with two boats pulling on it, and if I tried to sweep them the other way then they would go down. That is the reason that I done my sweeping at slack water.

Q. (Mr. TRUMBULL.) That would be the case anywhere the tide ebbs and flows?

A. Yes, sir. [127]

Q. (Mr. HUGHES.) That was particularly true on account of the currents being stronger there?

A. Certainly.

(Testimony of witness closed.) [128]

**[Testimony of G. G. Plummer, for Libelant.]**

G. G. PLUMMER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. HUGHES.) You are the manager of the Puget Sound Tug-boat Company?

A. Yes, sir.

Q. How long have you been manager?

A. I thing about five years.

Q. The Puget Sound Tug-boat company owned the tug "Sea Lion" at the time she was sunk in collision with the "Oceania Vance"? A. Yes, sir.



(Testimony of G. G. Plummer.)

Q. How long had they owned her?

A. They bought her, I think, on the 16th of February preceding the time she was sunk.

Q. Are you acquainted with the value of the "Sea Lion" at the time she was sunk?      A. Yes, sir.

Q. What was her value?

A. Why, with the fuel and equipments, hawsers, etc., on her I should judge from \$32,000 to \$35,000. Thirty to thirty-five thousand dollars.

Q. She had a full load of coal for her engines?

A. So I understand, she had a full cargo of fuel.

Q. She was a total loss, was she?

A. She was a total loss, yes, sir.

(Testimony of witness closed.)

Mr. HUGHES.—I think that is all of our case.

(Hearing adjourned.) [129]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

PUGET SOUND TUG-BOAT COMPANY,  
Libellant,

vs.

The "OCEANIA VANCE," etc.,  
Respondent.

To the Honorable, the Judges of the Above-entitled  
Court:

Pursuant to the order of reference herein and on this 18th day of August, 1909, the libellant appeared by Messrs. Hughes, McMicken, Dovell & Ramsey, and the claimant appeared by Mr. John Trumbull, his

proctor; thereupon the following proceedings were had and testimony offered:

**Claimant's Testimony. [130]**

**[Testimony of John G. Williams, for Claimant.]**

JOHN G. WILLIAMS, after having been duly cautioned and sworn, was examined by Mr. Trumbull, and testified as follows:

Q. What is your business?     A. Seafaring man.

Q. How long have you been a seafaring man?

A. Forty-three years.

Q. What were you engaged in on the 9th of June, 1909?     A. First mate.

Q. On what vessel?     A. The "Oceania Vance."

Q. How long had you been first mate of this vessel?

A. I think about two months.

Q. On the 9th of June of this year where was this vessel bound from and to what port?

A. From San Pedro to Port Townsend.

Q. Was she in cargo or ballast?     A. Ballast.

Q. Now, state what was the weather and the condition in regard to fog, if any, on the morning of June 9th.     A. The weather was very foggy.

Q. How long had it been foggy?

A. Since I came on deck; I came on at 4 o'clock; it was foggy then and from then until the time of the collision.

Q. At what time did you take watch?

A. At 4 o'clock.

Q. Was it foggy then?     A. Yes.

Q. Where was the captain?

A. On deck. [131]

(Testimony of John G. Williams.)

Q. At 4 o'clock? A. Yes, when I came on.

Q. How many men were in your watch?

A. Two.

Q. What were they?

A. The man at the wheel and the man on the lookout.

Q. Who was the man on the lookout?

A. Mackenzie.

Q. What was the name of the man at the wheel?

A. I don't know what his name was, they used to call him "Shorty" and that is about all.

Q. State what course you were sailing at that time?

A. We had the winds fairly aft, pretty nearly all that time and the only sail that was drawing was the spanker, all the rest might fill occasionally, but very rarely.

Q. You were sailing before the wind? A. Yes.

Q. And the wind was blowing in what direction?

A. From the westward.

Q. About what time did you pass Cape Flattery?

A. About 8:30 the night previous.

Q. At 6 o'clock in the morning whereabouts were you?

A. Somewhere about west of the Race Rocks; on account of the whistle.

Q. You judged that on account of the whistle?

A. Yes.

Q. That is the whistle from the Race Rocks lighthouse? A. Yes.

Q. Do you know how far you were from land?

(Testimony of John G. Williams.)

A. From my position I would think about a couple of miles. [132]

Q. State now, Mr. Williams, what kind of wind was blowing at about 6 o'clock.

A. I think the wind was somewhere about west, southwest.

Q. In regard to velocity what kind of wind was it?

A. We would certainly be going about six or seven knots and at that time we would be making about 5 knots with one sail drawing.

Q. You had been making about six or seven?

A. No, we made about five right throughout the night.

Q. And at this time about how much were you making? A. About five.

Q. In regard to the sails set, did you have all the sails up? A. No.

Q. What sails? A. All the topsails were down.

Q. The other sails were all set? A. Yes.

Q. Now, while you were sailing before the wind what was the effect in regard to all the sails?

A. If you and that gentleman were standing together, one behind the other, you would take an amount of the wind from that gentleman. It amounts to the same thing; one sail takes wind from the others.

Q. Have you any idea how fast the wind was blowing? A. I know it was a fresh wind.

Q. Do you know what the velocity of the wind was?

A. I do not.

Q. Did you have a horn on board? A. Yes.

(Testimony of John G. Williams.)

Q. Were you doing anything with it? [133]

A. Yes, blowing three blasts on it.

Q. How often did you blow?

A. About every three minutes.

Q. What does three blasts indicate?

A. That you are running before the wind.

Q. It indicates also that you are a sailing vessel?

A. Oh, yes, decidedly.

Q. What kind of a fog-horn was that?

A. It is one of the latest patents, a Norwegian patent, I believe.

Q. It works by hand? A. Yes.

Q. Who was operating it?

A. The man on the lookout.

Q. Ordinarily how far could such a horn be heard at sea?

A. The wind was aft us, the tug-boat could hear it about three miles off.

Q. The wind was blowing towards her?

A. Towards her, yes.

Q. Did you hear any whistles behind the fog-horn of Race Rocks? A. Not at 6 o'clock.

Q. When did you hear any whistles?

A. We jibed ship about 6:20.

Q. Explain what you mean by jibing ship.

A. Schooners running before the wind, we look to square the vessel, if the wind is aft you cannot keep it aft on account of the booms driving over. You have to keep her away from the wind and you cannot very well steer clear across. You have to keep the wind on one side and [134] then get the wind on



(Testimony of John G. Williams.)

the other side again. About 6:20 or a few minutes after we jibed ship we heard the tug-boat's whistle.

Q. What kind of a whistle was it?

A. A steamboat whistle, one long and two short, indicating it was steamer with something in tow.

Q. How long before the collision did you hear this whistle first?      A. About ten minutes.

Q. Did you hear it again?      A. Oh, yes.

Q. How often were they blowing the whistle?

A. I could not say, I did not time it, but I heard it several times.

Q. And you were on the lookout?

A. I was on the lookout.

Q. When did you first see the tug?

A. Almost a few seconds before the collision.

Q. About how far off was she when you saw her?

A. I should not think more than 250 or 300 feet off.

Q. How far could you see in that fog?

A. Not much more than a ship's length.

Q. What do you mean by a ship's length?

A. The length of the "Oceania Vance," say 300 feet.

Q. Was the captain on deck when you saw the tug?

A. Yes.

Q. What did you do?

A. We simply could not do anything.

Q. What did you do?

A. I told the captain—he was on the other side—I told him: [135] "Here she is, right under the bows," she was then right close to us.

Q. Could you tell what the tug was doing, whether

(Testimony of John G. Williams.)

she was going ahead or astern?

A. She was going ahead.

Q. Assuming that the tug had proper lookouts, could she see you before you saw her?

A. I should imagine so, because she was a larger vessel and also our white canvas with the dark background.

Q. Did she continue to go ahead until the collision?

A. Yes.

Q. What did the captain do on board the schooner?

A. He did not do anything; he could not do anything.

Q. Why could he not do anything?

A. Because for the simple reason we could not keep her away, we could not keep the schooner away because then we would have been on top of the tug-boat.

Q. That is if you had changed the course?

A. Yes, if we had changed the course.

Q. Explain how if you had changed your course you would have got on to the tug-boat.

A. For the simple reason we were under the idea that the steamer would have been going astern or stop, being so close to us, and instead she went going ahead and consequently under our bows.

Q. Did the tug-boat give any signal as to whether she was going ahead or going astern?

A. None whatever.

Q. Did she give any signal of any kind?

A. Only four short blasts. [136]

Q. What did that indicate?

(Testimony of John G. Williams.)

A. A danger signal.

Q. When did she give this signal?

A. Just a few seconds before the collision.

Q. When in regard to the time that you first saw the tug?     A. I should think about a minute.

Q. Before?

A. It was after we seen the tug-boat the signal was given.

Q. Was the signal given about the same time?

A. After we saw each other.

Q. Did the tug-boat give any signal that would indicate to those on the schooner as to whether she was going ahead or backing up?     A. None whatsoever.

Q. What are the signals for backing up or going ahead; do you know?

A. I am not a steamboat man; three whistles is going astern; if they had blown three whistles we would have known she was going astern.

Q. Now, assuming that she had reversed her engines and gone astern, would the collision have occurred?     A. No.

Q. Why?

A. For the simple reason we would have cleared her.

Q. What part of the tug did the schooner come into collision with?

A. Just abaft the engine-room, as far as I can remember, about two-thirds aft.

Q. That is not a head-on collision?

A. No. [137]

Q. The tug continued to move on forward until

(Testimony of John G. Williams.)

the collision took place?

A. Yes, kept going on I suppose until she went down, the engines must have been racing full speed ahead.

Q. How do you know that?

A. By her water aft, seeing the water coming away from the propeller.

Q. Did you see water coming away from the bow?

A. No, I see her stern race with the motion of the propeller under the water.

Q. That might be caused by backing up?

A. No, because if she was backing up the water would be going away forward, her race was going aft and not forward.

Q. Can you state in a general way the direction that the tug was going?

A. Before we saw her or after?

Q. After you saw her and the direction that the schooner was going that brought them in contact?

A. She was almost at right angles.

Q. The tug was to the schooner?      A. Yes.

Q. And you say that if she had backed her engines and backed off you would have passed right by?

A. Would have gone across her head, across her bow.

Q. Was there anything that those in charge of the schooner could have done after you sighted the tug to avert the disaster?

A. Nothing whatever, we were too close to each other, even if we had put the wheel the other way she could not have answered in time. [138]

Q. You were bound to come in contact?

(Testimony of John G. Williams.)

A. We were bound to come in contact.

Cross-examination.

Q. (Mr. RUPP.) You went on deck at 4 o'clock

A. M.? A. Yes.

Q. The captain was on deck? A. Yes.

Q. Was he on deck at the time of the collision?

A. Yes.

Q. What time did the collision occur?

A. As near as I recollect, 6:20, something like that.

Q. How many knots an hour do you think the wind was blowing at that time?

A. I don't know what the breeze was making, we were making about five knots.

Q. You jibed ship about 6:10?

A. I think it was 6:20 when the collision occurred.

Q. About ten minutes before the collision?

A. Yes.

Q. At the time you jibed ship all the sails on the vessel would fill? A. No.

Q. Why not?

A. Because then you fetch the ship right before the wind.

Q. You were proceeding from San Pedro to Port Townsend. When did you leave San Pedro?

A. I could not tell the dates.

Q. When did you arrive at Port Townsend?

[139] A. The same day.

Q. At what time?

A. In the afternoon about 3 o'clock.

Q. How long did this collision detain you; how long did you stop at the time of the collision?

A. I think we lost about 45 minutes.



(Testimony of John G. Williams.)

Q. The seamen on board the tug were taken on your boat?     A. Yes.

Q. Do you know what amount of speed you made after the collision?

A. I think we made six, it partly cleared up and the wind freshened.

Q. Had you been making any greater speed than five knots an hour before the collision?     A. No.

Q. At no time?     A. No.

Q. Since 1 o'clock in the morning we will say?

A. From the time we passed Cape Flattery at 8 or 9 the night previous.

Q. How many sails did you have set on this ship?

A. Seven.

Q. You have been mate on the boat two months?

A. Yes.

Q. And what were you doing previous to that, before you were mate on this boat?

A. I was mate on the "Phillipine."

Q. Are you mate on this boat now?     A. Yes.

Q. You think you were about two miles from land at the time [140] this collision occurred?

A. Yes, as near as I could make it.

Q. Somewhere near the Race Rocks at Victoria?

A. Yes.

Q. You say all the topsails were down?

A. Yes.

Q. All of them?     A. Yes.

Q. How far do you think you could see through the fog?

A. Not much more than a ship's length, about 300 feet.

(Testimony of John G. Williams.)

Q. How long was this "Oceania Vance"?

A. 250 feet, something like that.

Q. Do you know what its tonnage is?

A. I cannot say I do, the captain could answer.

Q. You keep a log on board the boat?      A. Yes.

Q. Who keeps the log?      A. I do.

Q. Is the log still on board this boat?

A. It is in the office.

Q. You say that immediately after the collision you made about six knots an hour?

A. We hove to and started to find what had come of the towboat and her tow, the barge.

Q. And stayed there about 45 minutes?

A. I think we lost that altogether.

Q. And after that you made?

A. About 5 or 6 knots after that.

Q. The breeze freshened during that time?

A. Just about the same. [141]

Q. And before the collision you were only making about five?

A. Yes, it cleared up a little and we could see further ahead.

Q. You think the boat was 300 feet away when you first saw her?

A. I don't think she was; 250 feet or something like that.

Q. You heard the signal from the boat before you saw it?      A. Yes.

Q. How long before?

A. About seven or eight minutes.

Q. About how many times did you hear it?

A. About four times, I guess.

(Testimony of John G. Williams.)

Q. It was giving the customary signals for tugs in charge of tow?     A. Yes.

Q. One long and two short blasts?     A. Yes.

Q. This was a pretty foggy morning?

A. Yes, very.

Q. What signals were you giving?

A. Three blasts of fog-horn.

Q. About how often?

A. Every two or three minutes.

Q. How long were you keeping the signals up?

A. More or less throughout the night.

Q. How long before the collision did you give one?

A. We gave them a little oftener when we heard the other signal, we kept them going almost continuously.

Q. About the time you heard the other signal you jibed ship?     A. No, before. [142]

Q. How far do you think you could hear the signals the way the weather was that morning?

A. The wind was against us, blowing away from us; I should think we ought to hear about a mile and a half.

Q. You think you ought to have heard her about a mile and a half?     A. Yes.

Q. And how far ought the tug to have heard yours?

A. A little further, a couple of miles fully but her whistle would certainly sound louder than our horn would.

Q. You think she could have heard your signal before you jibed ship?

A. I think she should have, certainly.

Q. This place where the collision occurred is in a

(Testimony of John G. Williams.)

place where vessels frequently pass back and forth?

A. Yes, they all do, right throughout the straits.

Q. Is it not a fact that for some time previous to the collision you were tacking back and forth to make increased speed?

A. We were taking several hours to make one of those stretches coming on from before midnight up to that one stretch up to 6:10 in the morning.

Q. Until the time you changed? A. Yes.

Q. If you had been tacking back and forward what amount of speed could you have made?

A. In regard to what?

Q. If you had been going straight ahead you would have made very little speed?

A. We could not have made so much. [143]

Q. But if you changed your course from time to time you could increase your speed?

A. Yes, by trying to keep the wind sail full.

Q. The spanker was full? A. Yes.

Q. The others were not? A. No.

Q. What I want to get at is this: After the collision you were able to make a better speed than before?

A. No, just the same speed except it cleared up a little, consequently would fill the other sails.

Q. And six knots an hour is about the speed you made?

A. About what we were doing at that time.

Q. Did you maintain that until you got into Port Townsend?

A. No, the wind lightened up and sometimes we were not making one mile.



(Testimony of John G. Williams.)

Q. What was this, a mechanical fog-horn?

A. Yes.

Q. You say that at the time of the collision the tug was proceeding straight ahead? A. Yes.

Q. You are sure of that? A. Yes.

Q. The engine had not been reversed?

A. That I cannot say but when I saw her she was going ahead, I could tell that by the water aft.

Q. You think then she was about 250 feet away?

A. About that, yes.

Q. You do not know whether or not her engines were reversed afterwards? [144]

A. I do not think so because they were still going ahead when she went down.

Q. You think they were still going ahead when she went down? A. Certainly.

Q. The danger signal was given on board the tug?

A. Yes, a few seconds before the collision.

Q. From the time you saw her until the collision what time elapsed? A. About two minutes.

Q. Then a few seconds before the collision the danger signal was given? A. Yes.

Q. The signal on board the ship was being given right along? A. Certainly.

Q. You would have been able to run up the Sound without jibing ship, would you not?

A. Not very well.

Q. You don't think so?

A. I don't think so, it is impossible, a schooner really cannot do it.

Q. Why not?



(Testimony of John G. Williams.)

A. Because you run the risk of damage by booms driving over.

Q. You hit the tug-boat where?

A. Just abaft the engine-room as near as I can remember.

Q. You were on deck all the time?

A. Yes, I was aft.

Q. And where was the captain?

A. Yes, on the weather side and walking to and fro from one side to the other.

Q. Was anyone else on deck? [145]

A. Yes, the man on the lookout.

Q. Who else? A. The man at the wheel.

Q. Just four of you? A. Yes.

Q. How many seamen were there on the ship at the time? A. Four.

Q. The whole four on deck? A. No, two below.

Q. You had no cargo at that time? A. No.

Q. Proceeding in ballast? A. Light, yes.

Q. Did you see anybody on the lookout on board the tug-boat?

A. That I could not say, I did not notice anyone.

Q. Until after the collision?

A. Of course, I was aft all the time; the captain went forward and got the people aboard over the head-gear.

Q. They got in the rigging?

A. They got up over our head, got on to our jib-boom.

Q. When after the collision did you next jibe ship; how long after?

(Testimony of John G. Williams.)

A. I don't think we jibed at all after that; I don't think so.

Redirect Examination.

Q. (Mr. TRUMBULL.) In what condition was the captain and the crew of the tug when they came on board?

Objected to on the ground that the question was incompetent, irrelevant and immaterial. [146]

A. The captain just put me in mind of a man just got out of bed.

Q. Had he got clothes on? A. Yes.

Q. What had he on?

A. Pajamas and slippers, one or two of the other crew their clothes were pretty vacant also.

Mr. RUPP.—The same objection.

Witness excused. [147]

Seattle, Washington, June 24, 1912.

PRESENT: Mr. HUGHES and Mr. RUPP, for the Libelant.

Mr. TRUMBULL, for the Claimant.

[Testimony of F. C. Scott, for Claimant.]

F. C. SCOTT, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. TRUMBULL.) Where do you live?

A. At West Port.

Q. In this state?

A. That is my home at present.

Q. You were captain of the "Oceania Vance" when—in June, 1909? A. Yes, I was at that time.

Q. You were captain of her at the time of the collision with the tug "Sea Lion"? A. I was.

(Testimony of F. C. Scott.)

Q. How long had you been captain of her?

A. At that time about 15 months.

Q. Had you been captain of her prior to that time?

A. Well, about 15 months before the collision I first took charge of the vessel.

Q. How long had you been a seafaring man?

A. Sixteen years.

Q. Sailing vessels all the time?

A. Sailing vessels and steam; mostly sailing.

Q. Since that time what have you been doing?

A. Following the sea.

Q. Here?      A. On the Pacific Coast.

Q. How much of a crew did you have on the "Oceania Vance" at that time? [148]

A. There was ten men, ten men besides myself; 11 all told.

Q. Who was at the wheel the morning of the collision?      A. I do not remember the man's name.

Q. Was it McKenzie?

A. No, McKenzie was on the lookout.

Q. Was it a fellow called Shorty?

A. They used to call him Shorty; I do not remember his name.

Q. Where were you at the time of the collision?

A. I was on deck, on the upper deck.

Q. How long had you been there?

A. Something over three hours.

Q. Where was the vessel coming from and where was she going to?

A. Bound from San Pedro to Port Townsend.

Q. Where did the collision take place?

(Testimony of F. C. Scott.)

A. Approximately three and a half miles east, magnetic, from Race Rocks.

Q. Do you recollect what direction the wind was blowing?

A. The wind was blowing about west southwest, or west by south.

Q. That is almost straight west?

A. Just about straight west, true.

Q. Making allowance for the variation of the compass?

A. Making allowance for the variation of the compass, which is  $22^{\circ}$  variation at that point.

Q. And so you mean that the wind was blowing about due west?     A. Due west, true.

Q. About what speed was the "Oceania Vance" making?

A. She was making approximately five knots an hour. [149]

Q. How do you arrive at that?

A. By the time it took her to run from Cape Flattery to Race Rocks; also from the time it took her to run from Race Rocks to Port Townsend.

Q. That was after the collision?

A. After the collision.

Q. How long did it take you, how many hours did it take you to run from Flattery to Race Rocks?

A. Flattery to Race Rocks? We passed Flattery, as near as I can remember about eight o'clock in the evening, and we passed the sound of Race Rocks whistle shortly before six in the morning. That gave us ten hours for something less than fifty miles.

(Testimony of F. C. Scott.)

Q. And how long did it take you to go from the point of collision to Port Townsend?

A. I do not remember the exact time we arrived at Port Townsend, but it was in the vicinity of four o'clock in the afternoon. Our collision was about 6:30 in the morning and the distance was something less than forty miles.

Q. At the time of the collision what direction were you sailing?

A. I do not remember exactly, but if I can look at this chart (Libelant's Exhibit "A") I can tell you. At the time of the collision?

Q. Yes, and just immediately prior.

A. If I remember right, I think the course was east by north, magnetic.

Q. What does east by north, magnetic, mean Captain?

A. It means one point to the northward of east on a [150] magnetic compass, allowing the variation at that particular point.

Q. East by north. Well, would that in common parlance be about due east?

A. No, that would be east by south on a true compass.

Q. East by south.

A. Yes, and east by north on a common magnetic compass.

Q. What direction, as far as you could tell, was the "Sea Lion" going?

A. She was coming approximately at right angles with me, bound to the southwest; I don't know what



(Testimony of F. C. Scott.)

direction exactly she was steering, but it would be across my bows.

Q. Now, did you hear the fog-horn or the whistle of the "Sea Lion"?

A. Yes, shortly after six o'clock. About 10 or 15 minutes before I struck him.

Q. About what direction did you hear him?

A. I would judge that he was about three points on the port bow when I first heard him.

Q. How many times did you hear him before the collision? A. Oh, about a dozen times.

Q. And what were you doing in regard to making signals? A. What was I doing?

Q. Yes.

A. I was blowing my fog-signals at regular intervals of about one a minute.

Q. What was the signal that you were blowing?

A. Three blasts of the fog-horn.

Q. What did that indicate?

A. That indicated that I was running with the wind free, [151] running with a fair wind.

Q. Did it indicate what kind of a vessel it was?

A. It indicated it was a sailing vessel.

Q. When did you see the "Sea Lion"?

A. I saw him about a minute before the collision.

Q. About what distance was he from you?

A. A couple of ship lengths he was, at least I say he was possibly two ship lengths from us. I was standing on the aft part of my vessel and I could see him probably a minute before I struck him, and he may have been one ship length away from the bow.

Q. From the bow of the vessel?

(Testimony of F. C. Scott.)

A. Oh, he may have been two; it is hard to judge distance in the fog when we were close.

Q. You were on the aft part of the vessel?

A. I was on the aft part of the vessel.

Q. From where you saw him could you tell which way he was heading?

A. I could tell which way he was heading.

Q. Then he was keeping up this signal all the time, was he?      A. Oh, yes, he was sounding signals.

Q. What was his signal?

A. His signal was one long and two short blasts of the whistle.

Q. What did that indicate?

A. That indicated he was a towboat, he was a steamer with something in tow.

Q. Well, when you saw this towboat, what did you do then?

A. I did nothing but keep on as I was going.

Q. Why? [152]

A. Because there was nothing to do. I did not know what he was doing. According to the rules of the road I had to keep on.

Q. Do you know whether or not he reversed his engine?      A. I do not.

Q. You do not know that of your own knowledge?

A. That I only know by hearsay.

Q. Did the captain tell you he had reversed his engines?      A. Yes, he told me he had.

Q. Did he give any signals indicating that he had reversed his engines?      A. No.

Q. What would be the signal if he had reversed his

(Testimony of F. C. Scott.)

engines?     A. Three short blasts of the whistle.

Q. If they had given any such signal what would you have done.

A. I would have endeavored to keep ahead of the towboat, and I would have endeavored to put my helm hard aport and tried to come around this way and get ahead of her; I would have known then that she was going astern.

Q. As far as you could judge, as far as you knew, she was coming on ahead?

A. I did not know what he was doing.

Q. As far as you knew she was coming?

A. She was pointed that way.

Q. What portion of the steamer did you come in contact with?

A. A little abaft amidships, that is to say a little bit further than half way aft.

Q. Assuming that she had reversed her engines and then after coming almost to a stop, had signaled full speed ahead, would that action on the part of the steamer have anything to do with causing the collision?

A. Well, evidently it had something to do without his keeping [153] a straight course and according to their testimony that is exactly what they did. Now, had they kept on and not reversed their engines, there would have been no collision.

Q. State why?

A. Because this reversing their engines for a certain length of time, we don't know how long, but it tended to stop the vessel, possibly she was going

(Testimony of F. C. Scott.)

astern, I don't know but had they kept on at full speed ahead, they would have covered two or three or four ship lengths, and she would have cleared us nicely. Suppose they had been stopped, the way through the water had been stopped at the time they saw me, and with the engines going full speed astern, I was clearing them by at least a half a ship length. Say this was their vessel and this was me here (showing) I was clearing them by a half a ship length had they kept their vessel going full speed astern, I ought to have cleared them that way.

Q. You would have cleared them if they had kept their vessel going full speed astern?

A. I would have gone ahead.

Q. If they kept their vessel going full speed ahead how would you have cleared them?

A. I would have gone astern.

Q. Across their tow-line?

A. Across their tow-line.

Q. In any event, if you had come in contact with them, what was the chance of your coming in contact with some other portion of the vessel which would not have been a vital point?

A. Well, that I don't know. Every vessel has a vital spot. [154] Some have that vital spot more vital than others. We might have struck some part of the vessel that would not have been so much at the time, we might have struck their water-tanks, which would not have made any difference if they did fill, they were full of water any way.

Q. As it was you struck them in a portion where the machinery was located?



(Testimony of F. C. Scott.)

A. I do not know exactly; I do not know what part of that vessel it was, but it was far the most flimsy part of the steamer, most easily broken into.

Q. With fatal results to the vessel?

A. Yes, sir.

Q. If I remember right, Captain Lovejoy testified that where you were, where your vessel was, was an unusual place for sailing vessels to be bound for Port Townsend. How about that, Captain?

A. Well, I have been trading to Port Townsend a good many years, and I have been over pretty near every foot of ground or water, as the case might be, on Puget Sound. Sailing vessels you cannot put on a straight course like a steamer. You have to go where you can do the best, where you can navigate your vessel, and there is no regular track for sailing vessels.

Q. There is no regular track like there is for steamers? A. No, sir.

Q. Now, Captain Lovejoy also stated that by reason of that fact, that it was an unusual place for sailing vessels going to Port Townsend, he assumed that this vessel whose fog-horn of yours, which was the "Oceania Vance's," that [155] you were bound for Royal Roads? Was there any basis for any such assumption as that?

A. Well, from his position I could have on a scratch been bound for Royal Roads. My wind would have been abeam. Had it been to the forepart of the beam I could not have been blowing three whistles. I could have on a scratch been bound for Royal Roads. He might mistake that. But from



(Testimony of F. C. Scott.)

this position I could have been bound for any place in the Straits of Georgia or Puget Sound or the Straits of Juan de Fuca.

Q. Well, Captain, assuming that you were bound for Royal Roads what would have been the signals that you would have been giving?

A. Fog-signals?

Q. Yes, sir.

A. Well, the wind you will notice here from his position—now, my position is a little different from his position, but from his position up to Royal Roads, it lies in here.

Q. What direction from his position?

A. Northwest magnetic. My wind was west southwest. It would have been a matter of my own judgment had I hauled on that course whether to give two blasts of the fog-horn or three; had the wind been abaft the beam I would have given three blasts, but in going in that direction I would have been hauling my wind a little bit forward, and I would have been giving two blasts if the wind had been directly abeam, the speed I was going and I would naturally haul the wind a little forward on the beam and I would have given two blasts of the fog-horn according to his position. [156]

Q. Now, why?

A. Because I would be on the port tack.

Q. And according to the rules of the road that would be the signal?

A. That would be the signal to give on the port tack.

(Testimony of F. C. Scott.)

Q. Now the signals that you were giving implied what?

A. That I was running with the wind abaft the beam.

Cross-examination.

Q. (Mr. HUGHES.) Captain, what is the size of the "Oceania Vance"?

A. If I remember right she is 384 net tons.

Q. What rig is she? A. Schooner.

Q. How many masts? A. Three.

Q. And how long is she?

A. I don't know exactly, something like 140 feet over all.

Q. How far was it from the poop-deck where you stood to the bow? A. Approximately 120 feet.

Q. What time did you get past Cape Flattery?

A. Eight o'clock or shortly after.

Q. You passed the cape and were bound eastward up the straits at that hour. A. Yes, sir.

Q. Where is your log, Captain?

A. The log-book must be aboard the "Oceania Vance."

Q. How long has it been since you were connected with the [157] "Oceania Vance"?

A. About two years last January.

Q. Have you seen the log since? A. No.

Q. Have you had any memorandum-books or dates or anything of that kind by you?

A. Not with me, that is all in the log-book, though.

Q. You are testifying from your recollection then? A. I am testifying from my recollection.

Q. You said the distance from Cape Flattery to

(Testimony of F. C. Scott.)

Race Rocks was fifty miles?

A. Approximately, more or less.

Q. Well, did you have out any log for the purpose of determining the distance your vessel traveled that night?

A. I had out a check log to give me an approximate idea of what she was doing.

Q. Do you know what distance was traveled that night up to the time of the collision?

A. I don't know what she logged because the log was unreliable and I would only use it in case I wanted to in short tacks.

Q. How many tacks did you make coming up that night? A. Made no tacks whatever.

Q. Had you made none at all prior to the time you changed your course for Port Townsend? You changed your regular course after passing Race Rocks?

A. Yes, I changed my course after passing Race Rocks.

Q. Did you change your course at all prior to that?

A. Yes, I changed my course before that.

Q. How many times? [158]

A. I do not remember.

Q. Did you all the time run before the wind?

A. I always ran before the wind.

Q. The speed you would make would depend on where you had the wind, of course?

A. To a certain extent it would.

Q. You cannot tell how much distance you covered, estimating the distance in a straight line at

(Testimony of F. C. Scott.)

fifty miles, you cannot tell how much more you traveled than fifty miles?     A. Very little more.

Q. It would be some more if you changed your course a number of times?

A. It might be a fourth of a mile more on a mile run; something like that.

Q. But if fifty miles travel, and to make that distance you travel more than fifty miles?

A. Very little.

Q. How do you conclude that you were only running five miles an hour?

A. By the distance between Cape Flattery and Race Rocks and the number of hours it took to run it.

Q. You were a witness before the inspectors were you not, after this collision?     A. I was.

Q. On or about June 14th, 1909. At that time you gave this testimony:

“Q. About what speed were you going?”

“A. I should judge by figuring from my log, the vessel was going between six and a half and seven knots.” [159] Was that correct?

A. At that time I had not figured up my distance.

Q. You say here, “By figuring from my log the vessel was going between six and a half and seven knots.” You had the log at the time and evidently figured from it?

A. As I say, at that time I had not figured my distance. I did not have the time to figure the distance. I was too busy. I jumped up to the inspectors and took the examination, or was there for the examination.



(Testimony of F. C. Scott.)

Q. The collision occurred on the 9th and your examination did not take place until the 14th, after the 14th day of June, five days elapsed; do you mean to say that you did not have access to your log during the five days, to consider any of these matters?

A. I had access to my log at all times.

Q. Did you bring your log with you to the Inspector's office.

A. The log was with me at the Inspector's office.

Q. Right there with you in the Inspector's office?

A. Yes, sir.

Q. And when you answered this question, you figured from your log, didn't you?

A. I did not figure from anything. That was my own opinion at the time.

Q. You gave this answer to the question propounded:

"Q. About what speed were you making?" and you answered:

"A. I should judge by figuring from my log, the vessel was going between six and a half and seven knots."

Q. You gave that answer to that question? [160]

A. I did, I gave that answer to the question.

Q. You were also asked this question, "When did you pass the Cape?" and you answered, "Nine o'clock Wednesday night." Is that correct?

A. I do not remember what I answered.

Q. Well, I ask you to look at this transcript of your testimony, and tell me whether or not that question was propounded to you and you gave that an-



(Testimony of F. C. Scott.)

swer. A. Which part of it?

Q. I just read you that question there, and then this question here, "What time did you pass the Cape?" and your answer, "Nine o'clock." You gave that testimony, did you not?

A. I was always of the impression that it was eight o'clock.

Q. You gave that testimony?

A. I do not remember whether I did. I do not remember whether I gave it.

Q. I show you a copy of the testimony taken at that time and ask you if you are now disposed to dispute its correctness?

A. No, I am not disposed to dispute it, if that is a straight copy of what I said up there, it must be.

Mr. TRUMBULL.—Is it certified?

Mr. HUGHES.—It is not certified.

Q. You had your log at the time?

A. I had my log, but it was not brought in as evidence.

Q. You had it and referred to it?

A. I did not refer to it, not there. I did not refer to my log whatever, because I had my log books there and they never asked me to refer to my log books, never wanted to [161] see them. If I could volunteer a little information on that.

Mr. HUGHES.—I am questioning you now.

Q. Was the fog thick just prior to the collision?

A. It was.

Q. When you saw the tug first you thought it was about 300 feet away from where you were standing?

(Testimony of F. C. Scott.)

A. It was more than that; it was more than three hundred feet from where I was standing.

Q. Which way was she?

A. About three points on the port bow.

Q. You have testified that when you heard her fifteen minutes before, the fog signals were three points on your port bow?     A. Exactly.

Q. Now, I ask you where she was when you saw her loom out of the fog?

A. Three points on the port bow.

Q. Still three points on the port bow.

A. Yes, sir.

Q. So she had not traveled any in that fifteen minutes?

A. Oh, yes, I guess she must have been traveling.

Q. Captain, in this same hearing before the Inspectors, you gave this testimony: "Q. At the time of the breaking through the fog up to the time of the collision, did you think there was time enough for either vessel to have been maneuvered so as to clear?" and you answered, "I do not think anything in the world would have averted the collision." Didn't you give that testimony?

A. I gave that testimony, but I meant it on my own part; I did not mean it for the other people. [162]

Q. The question was, "Did you think there was time enough for either vessel to have been maneuvered so as to clear?" and your answer was, "I do not think anything in the world would have averted the collision." Did you give that answer?

A. If I did I misunderstood the question.

(Testimony of F. C. Scott.)

Q. The question was perfectly clear, was it not?

A. As I hear it now it is. If I gave that answer I must have misunderstood the question. I meant that for my own vessel only.

Q. Now, how long was it before the collision that you had changed your course, wore your ship?

A. About twenty minutes.

Q. How much did you change your course at that time. A. About three points.

Q. In other words, prior to that time your course was what? A. Approximately northeast by north.

Q. Why were you keeping so far to the north?

A. So that I could get that position or get a departure in other words from the sound of Race Rocks whistle to enable me to make Point Wilson.

Q. Well, as soon as you were abeam of Race Rocks whistle did you change your course?

A. Not when I was abeam.

Q. How soon after.

A. I ran past until the Race Rocks bearing on a point—on a line with Point Wilson. You understand me, I get between Race Rocks and Point Wilson so that I could keep directly on that line and make port.

Q. Well, you were in a position where you could hear the [163] whistle behind you and then govern your direction by your chart? A. Exactly.

Q. What sails did you have on?

A. I had the—at what time, at the time of the collision?

Q. Yes.

A. I had the courses, foresails, jib and spanker topsail.

(Testimony of F. C. Scott.)

Q. Had you taken in any sails before the collision?

A. Prior to that, yes.

Q. When?

A. Sometime during the time, I don't know just when, I do not think I was on deck at the time the sails were taken in.

Q. Was the mizzen topsail set at the time of the collision?      A. The mizzen topsail was set.

Q. What course did you say you were steering at the time of the collision?

A. I think it was east by north magnetic.

Q. Did you see the tug before the lookout called out?      A. No, sir.

Q. Were you laden at this time?

A. I was light.

Q. Was the tug going ahead when you collided?

A. I could not say, I think she was.

Q. Why do you think she was?

A. Because she changed her position from three points on my port bow to right under my bow.

Q. Did she change your position any when the collision occurred?

A. The force of the collision changed my position, that is [164] it would not change my position much, but it would change the ship as I struck the tug, her going full speed ahead would bring my bow around.

Q. Brought your bow into the wind?

A. Up into the wind.

Redirect Examination.

Q. (Mr. TRUMBULL.) What statement was

(Testimony of F. C. Scott.)

that you wanted to make about the log?

A. About the log?

Q. Yes, you wanted to make some statement.

A. Oh, in regard to my patent log.

Q. Yes.

A. I do not know, unless it was that the log is not reliable and it was overrunning and I just used it only as a check; I was not using it to run distances with whatever.

Q. You testified before the Inspectors?

A. Yes, sir.

Q. When there was an inquiry in regard to this collision? A. Yes, sir.

(Testimony of witness closed.)

Hearing adjourned. [165]

### **Commissioner's Taxable Costs.**

#### **LIBELANT:**

Hearings Apr. 10, 1911; Apr. 22, 1912; Apr.

26, 1912; May 6, 1912.....\$12.00

Administering oaths to 8 witnesses..... .80

Marking and filing 2 exhibits..... .20

Transcript above hearings, 250 folios at 10c... 25.00

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\$38.00

#### **CLAIMANT:**

Hearings August 18, 1909, June 24, 1912..... 6.00

Administering oaths to 2 witnesses..... .20

Transcript above hearings, 80 folios at 10c.... 8.00

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\$14.20



**[Certificate of Commissioner to Transcript of  
Testimony, etc.]**

United States of America,  
Western District of Washington,  
Seattle, Washington,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, do hereby certify that the foregoing transcript, from page 1 to page 135, both inclusive, contains all of the testimony offered by the parties before me. Said testimony was taken by myself, or under my direction, on the dates mentioned in the transcript. The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth. Proctors for the parties stipulated waiving the reading and signing of the testimony by the witnesses, agreeing that it should have, when returned into court by me, the same force and effect as if so read and signed by them. The exhibits offered during the taking of the testimony, to wit, Libelant's Exhibits "A" and "B," are marked and returned by me herewith. I further certify that I make the return of the testimony on this day, and not earlier, for the reason that I have just been advised by proctors that the testimony was closed. I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 21st day of January, A. D. 1914.

[Seal]

A. C. BOWMAN,  
U. S. Commissioner.

[Indorsed]: Testimony: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 28, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [167]

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[Opinion.]

*United States District Court, Western District of  
Washington, Northern Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent,

COAST SHIPPING COMPANY,

Claimant.

Filed August 31, 1914.

ON LIBEL FOR COLLISION.

DECREE FOR LIBELANT AS PRAYED FOR.  
HUGHES, McMICKEN, DOVELL & RAM-  
SEY, for Libelant.

REYNOLDS, BALLINGER & HUTSON, for  
Claimant.

NETERER, District Judge:

At about 6:30 A. M., June 19, 1909, the "Sea Lion," being 107 feet in length, beam 22 feet, depth of hold 13 feet, having in tow the barge "Charger," having 1700 ton capacity, laden with rock, and sail-

ing from Cowlitz Bay on Waldron Island, bound for Grays Harbor, came into collision with the schooner "Oceania Vance," while proceeding on her regular course toward the Straits of Juan de Fuca, the weather being thick and foggy. The course of the "Sea Lion" was SW. S.  $\frac{1}{4}$ S, that being the usual course for steam vessels outward bound. Upon entering the fog the "Sea Lion" started to blow its whistle, a deep, coarse whistle, one long and two short blasts, the prescribed signal for a vessel having a tow. Fed. Stat. Annot. Vol. 2, page 159, 29 Stat. at L. 381. This was continuously sounded until the time of the collision. Just prior to the collision, the men on board the tug "Sea Lion" heard the "Oceania Vance" giving three blasts, which indicated that she was a sailing vessel. 29 Stat. at L. 381. The "Sea Lion" stopped its engines and blew its tow signal. The schooner answered by three blasts of [168] her horn. The schooner was about 175 to 200 feet distant from the tug when first seen by the men on the tug and was heading toward amidships of the "Sea Lion." The schooner observed the tug when it was about 300 feet distant. On seeing the schooner the mate gave the signal to reverse the engines and ordered the quartermaster to put the wheel hard-a-starboard. At this time the captain, who had previously retired, reached the wheel-house and the mate went aft to endeavor to prevent the hauser from fouling the propeller. The "Sea Lion" when backed, had a habit of swinging around to port very abruptly, thus bringing her right in line with the way the schooner was coming

and making a collision inevitable. The captain, in an endeavor to avert the same, ordered full speed ahead, that being the only chance in his judgment that he then had. The three signals, namely, to stop, to back, and to go ahead, were given one right after the other. At the same time, the captain called to the lookout on the "Oceania Vance" to put the wheel of the schooner over. This request was not complied with, though good seamanship required such action. A few seconds later the bow of the "Oceania Vance" struck the "Sea Lion" about 25 feet forward of the latter's stern, cutting a hole variously estimated from  $1\frac{1}{2}$  to 3 feet in width. The "Sea Lion" sank within a few minutes in 72 fathoms of water. The "Oceania Vance," at the time of the collision, was going at a speed to exceed seven miles an hour. She was sailing before the wind, with the foresail, jib, spanker and mizzen-top-sail set. A "strong breeze" was blowing and the place where the collision occurred was where ships frequently pass.

The liability in this case depends wholly upon the fact as to whether or not the speed at which the "Oceania Vance" was going immoderate. It is strongly contended on the part of the claimant that she was going not to exceed a speed of five [169] knots an hour, and that that was not an immoderate speed. I think a fair consideration of the testimony is conclusive that the schooner was going not less than six and one-half or seven knots an hour. The fact that she was sailing before the wind with practically all of her sails set, with a "strong breeze"



blowing, as stated by one of the witnesses, and by practically all of the witnesses that there was a good breeze, and the further fact of the testimony of the captain immediately after the collision that the boat was going at a speed of six and one-half to seven miles an hour, and he had concluded this after an examination of the log, and only modified his testimony upon the hearing some two years after the collision, and all of the facts as disclosed by the witnesses in the record, would indicate that the vessel was moving at the speed suggested. It is also strongly contended upon the part of the claimant that even though the speed of the schooner was seven miles an hour, that that was not an immoderate speed, and that the conduct and action of the tug "Sea Lion" in reversing its engines and then going forward instead of stopping the engines and moving at a moderate speed, was the cause of the injury and it was the negligence of the tug "Sea Lion" that caused the collision. From a fair consideration of the evidence, I think it must be concluded that what was done by the officers of the "Sea Lion" were acts *in extremis*, and whether wise or not, is not imputable as a fault—Ship "Blue Jacket" v. Tacoma Mill Co., 144 U. S. 371; the Ludvig Holberg, 157 U. S. 60. In view of the density of the fog, it was imperative upon the schooner to move at a moderate speed. This is necessary in order to give approaching vessels an opportunity of observation and greater time within which to adjust themselves to the situation. It has been frequently held that a speed of five knots an hour is not an immoderate speed for a sailing ves-



sel. If the schooner had been moving at five knots an hour instead of seven, as I believe the testimony to show, there would [170] have been considerable more time, relatively speaking, after the vessel had been discovered, for the crafts to adjust themselves with relation to the situation, and the collision having occurred at a place where ships are frequently passing, the necessity was therefore emphasized for moderation in speed. This is a duty irrespective of the statute—The Rhode Island, 17 Fed. 554.

In 26 Stat. at Large, page 326, 2d Fed. Stat. Annot., page 160, it is provided.

“Every vessel shall, in a fog, mist, falling snow or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions. A vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case shall permit, stop her engines, and then navigate with caution until danger of collision is over.”

While this statute does not include sailing crafts, yet the principle enunciated is held to comprehend and be applicable to sailing vessels. The further fact that a sailing vessel cannot be maneuvered in the manner required, is a strong reason, as stated by the courts, for so moderating her speed as to furnish effective aid to an approaching steamer, charged with the duty of avoiding her. She can do practically nothing beyond putting her helm up or down,

to "ease the blow," after the danger of collision has become imminent.

I think this case is on "all-fours" with "The Chattahoochee," 173 U. S. 540, where the duty of a sailing vessel in a fog is defined, and in which the Court reviews all of the authorities.

A consideration of that case with the facts in this case precludes any conclusion other than that a decree should be entered for libelant as prayed for, and it is so ordered.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 31, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. [171]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY,

Claimant.

**Notice of Taxing Costs.**

To the Above-named Claimant and to Reynolds,  
Ballinger & Hutson, Its Proctors Herein:

You will please take notice that the libelant herein will make application to the clerk of said court, at his office in the Federal Building, in the City of Seattle, Washington, on the 2d day of November, 1914, at the hour of 9:30 o'clock A. M. of said day, to tax said libelant's costs and disbursements in said action. There is herewith served upon you a copy of said libelant's memorandum of costs and disbursements.

Dated: October 30, 1914.

HUGHES, McMICKEN, DOVELL & RAM-  
SEY,

Proctors for Libelant. [172]

Copy of within notice received this 30th day of October, 1914, and consent to said action at said time.

BALLINGER & HUTSON,

Proctors for Claimant.

[Indorsed]: Notice of Taxing Costs. Filed in the U. S. District Court, Western District of Washington, Northern Division. Oct. 30, 1914. Frank L. Crosby Clerk. By E. M. L., Deputy. [173]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libelant,

vs.

The Schooner "OCEANIA VANCE," her Tackle,  
Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY,

Claimant.

**Memorandum of Libelant's Costs and Disburse-  
ments.**

To the Clerk of the above-named Court:

You will please tax the following costs and dis-  
bursements in favor of the libelant, Puget Sound  
Tug-Boat Company, and against the claimant, Coast  
Shipping Company, and F. A. Bartlett and H. M.  
Thornton, its sureties, viz:

Clerk's fees .....\$13.70

Marshal's fees ..... 57.69

U. S. Commissioner's fees..... 38.00

Proctor's fees:

Docket fee .....\$20.00

Deposition fees:

Witness C. Anderson ..... 2.50

" C. H. Lewis ..... 2.50

" L. B. Lovejoy..... 2.50

"	G. E. Plummer .....	2.50	
"	J. F. Primrose .....	2.50	
"	Chas. Ross .....	2.50	
"	Wm. J. Smith .....	2.50	
"	H. E. Stream .....	2.50	
"	T. G. Scott .....	2.50	
"	J. G. Williams .....	2.50	
		—	45.00
			<hr/>
	Carried For'd..		\$154.39

[174]

Brought For'd.. \$154.39

## Witness' Fees:

Witness C. Anderson, 1 day & mileage .....	\$3.20	
Witness C. H. Lewis, 1 day & mileage .....	3.20	
Witness L. B. Lovejoy, 1 day & mileage .....	3.20	
Witness G. E. Plummer, 1 day & mileage .....	3.20	
Witness J. F. Primrose, 1 day & mileage .....	3.20	
Witness Chas. Ross, 1 day & mileage .....	3.20	
Witness Wm. J. Smith, 1 day & mileage .....	3.20	
Witness H. E. Stream, 1 day & mileage .....	3.20	25.60
	—	<hr/>
		\$179.99



HUGHES, McMICKEN, DOVELL & RAMSEY,  
Proctors for Libelant.

State of Washington,  
County of King,—ss.

H. J. Ramsey, being first duly sworn, on oath deposes and says: That he is one of the proctors for said libelant in the above-entitled cause; that he has read and knows the contents of the above and foregoing memorandum of costs and disbursements, and that the items therein contained are correct, and, with the exception of proctor's fees, have been actually and necessarily disbursed or incurred by said libelant in the prosecution of said action.

H. J. RAMSEY,

Subscribed and sworn to before me this 30th day of October, A. D. 1914.

[Seal]

JOHN P. GARVIN,

Notary Public in and for the State of Washington,  
Residing at Seattle. [175]

Copy of within Memorandum received this 30th day of October, 1914.

BALLINGER & HUTSON,  
Proctors for Claimant.

[Indorsed]: Memorandum of Libelant's Costs and Disbursements. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 30, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [176]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libelant,

vs.

The Schooner "OCEANIA VANCE," her Tackle,  
Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY,

Claimant.

**Decree.**

In this cause, monition having been regularly issued and the said schooner "Oceania Vance," her tackle, apparel and furniture having been duly seized thereunder by the United States Marshal, and said Coast Shipping Company, a corporation, having made and filed herein claim to said vessel, her tackle, apparel and furniture, in the manner provided by the rules of this court, and having filed in said cause its stipulation for costs in the sum of Two Hundred Fifty (\$250.00) Dollars, duly executed by itself and by F. A. Bartlett and H. M. Thornton, as sureties, and having also given and filed herein its bond for the release of said vessel, her tackle, apparel and furniture, in the penal sum of Five Thousand (\$5,000.00) Dollars, duly executed by itself, as principal, and by

The Fidelity and Deposit Company of Maryland, a corporation organized and [177] existing under the laws of the State of Maryland, as surety, and approved by the Court; and said vessel, her tackle, apparel and furniture, having been thereupon released and surrendered to the said claimant; and the testimony in said cause having been duly taken and said cause duly submitted to the Court, and the Court having given and filed herein its opinion and decision;

NOW, THEREFORE, pursuant to the Court's decision, it is hereby ORDERED, ADJUDGED and DECREED that the above-named libelant, Puget Sound Tug-Boat Company, have and recover of and from said Coast Shipping Company, a corporation, and said The Fidelity and Deposit Company of Maryland, a corporation, the sum of Five Thousand (\$5,000.00) Dollars, with interest thereon from this date until paid at the rate of six per cent (6%) per annum; and that said libelant have execution therefor against said Coast Shipping Company, a corporation, and said The Fidelity and Deposit Company of Maryland, a corporation, and that said libelant Puget Sound Tug-Boat Company, have and recover of and from the said Coast Shipping Company and said F. A. Bartlett and H. M. Thornton the said libelant's costs and disbursements herein taxed at the sum of One Hundred Seventy-nine and 99/100 Dollars, and have execution therefor against said Coast Shipping Company and said F. A. Bartlett and H. M. Thornton.

And it is by the Court ORDERED that no execution

issue upon this decree for the collection of any portion thereof for the period of ten (10) days from this date, and that said decree may be stayed in whole or in part at any time within ten (10) days from this date, by the giving of a supersedeas bond and taking an appeal in the manner provided by law and the rules of the United States Circuit [178] Court of Appeals for the Ninth Circuit.

Done in open court this 4th day of Nov., 1914.

JEREMIAH NETERER,  
Judge.

O. K. as to form.

BALLINGER & HUTSON,  
Proctors for Claimant.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Nov. 4, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[179]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," her Tackle,  
Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

**Order Fixing Amount of Stay Bond.**

This cause coming on to be heard on the application of claimant, Coast Shipping Company, for an order fixing the amount of bond to stay the execution of final decree against said claimant and its bond given for the release of said vessel in this cause, upon appeal from said decree, the said decree being dated the 4th day of November, 1914, libelant appearing by Messrs. Hughes, McMicken, Dovell & Ramsey, its proctors, and claimant appearing by Messrs. Ballinger & Hutson, its proctors, and the court being duly advised in the premises,

**IT IS HEREBY ORDERED:** That the amount of bond which said claimant, Coast Shipping Company, a corporation, shall give to stay the execution of the final decree herein, pending appeal from said decree, shall be the sum of Seven Thousand Two Hundred Fifty Dollars in addition to the sum of Two Hundred Fifty Dollars (\$250.00) bond for costs on appeal.

Dated at Seattle, Washington, this 4th day of February, A. D., 1915.

**EDWARD E. CUSHMAN,**

Judge. [180]

[Indorsed]: Order Fixing Amount of Stay Bond. Filed in the U. S. District Court, Western Dist of Washington, Northern Division, Feb. 3, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[181]



*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

The Schooner "OCEANIA VANCE," her Tackle,  
Apparel and Furniture,

Respondent,

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

**Notice of Appeal.**

To the Above-named Libelant, Puget Sound Tug-Boat Company, a Corporation, and to Messrs, Hughes, McMicken, Dovell & Ramsey, Proctors for Libelant:

Please take notice that the above-named Coast Shipping Company, a Corporation, claimant of the schooner "Oceania Vance," her tackle, apparel and furniture, respondent, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree made and entered in this cause wherein and whereby the above-named District Court did render judgment against this claimant and against the Fidelity and Deposit Company of Maryland, a corporation, in the sum of Five Thousand Dollars (\$5000.00) with interest, and did render judgment against said claimant and F. A.

Bartlett and H. M. Thornton for libelant's costs and disbursements, therein taxed at the sum of One Hundred Seventy-nine and 99/100 Dollars (\$179.99) which said final decree was made on, to wit, the 4th day of November, 1914.

This appeal is from the whole of said decree and each and every part thereof.

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

BALLINGER & HUTSON,  
Proctors for Claimant.

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Proctors for Claimant. [182]

Due and timely service of within notice of appeal admitted by receipt of copy thereof this 18th day of March, A. D. 1915, after the filing thereof.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
Proctors for Libelant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 18, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [183]

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*In the United States Circuit Court of Appeals,  
Ninth Circuit.*

No. 4046.

COAST SHIPPING COMPANY, a Corporation,  
Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Appellee.

KNOW ALL MEN BY THESE PRESENTS, That we, Coast Shipping Company, a corporation, as principal, and Southwestern Surety Insurance Company, a corporation, as surety, are held and firmly bound unto Puget Sound Tug-Boat Company, a corporation, appellee above-named, in the full and just sum of Seven Thousand Five Hundred Dollars (\$7,500.00) to be paid to the said Puget Sound Tug-Boat Company, its successors and assigns, for which payment, well and truly to be made, we bind ourselves and our and each of our successors and assigns, jointly and severally firmly by these presents.

SEALED with our seals and dated this 18th day of March, A. D. 1915.

WHEREAS, lately, to wit, on the 4th day of November, 1914, at the District Court of the United States for the Western District of Washington, Northern Division, in a suit in admiralty pending in said Court between said Puget Sound Tug-Boat Company as libelant against the schooner "Oceania Vance," her tackle, apparel and furniture, as respondent, and said Coast Shipping Company, a corporation, claimant, wherein said claimant gave bond in the sum of Five Thousand Dollars (\$5,000.00) for the release of said schooner, a final decree was rendered in favor of said libelant, the above-named appellee, and against said Coast Shipping Company, claimant, the above-named appellant, and [184] against the Fidelity and Deposit Company of Maryland, a corporation, surety upon said bond, in the sum of Five Thousand Dollars (\$5,000.00) and interest; and further rendered judgment against said

claimant and its surety on its stipulation for costs, in the sum of One Hundred Seventy-nine and 99/100 Dollars (\$179.99) and in favor of said appellee; the said Coast Shipping Company, claimant in said action and the appellant above-named, having filed and served notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the aforesaid final decree to reverse the same, and having obtained a citation directed to said Puget Sound Tug-Boat Company of date the 18th day of March, 1915, citing and admonishing it to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, within thirty days of the date thereof;

NOW, THEREFORE, the condition of the above obligation is such that if the above bounden Coast Shipping Company, a corporation, shall prosecute its appeal to effect and pay the costs of such appeal, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit in the cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit by the court below, and pay any decree of the Court upon appeal or otherwise, and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void; otherwise

to remain in full force and virtue.

COAST SHIPPING COMPANY,

Appellant.

By H. BALLINGER,

Its Proctor and Agent.

O. K.—HUGHES, McMICKEN D. & R.,

Proctors for Appellee.

SOUTHWESTERN SURETY INSUR-  
ANCE COMPANY.

[Seal]

By E. LAMPING,

Agent.

R. G. DENNEY,

Atty. in Fact.

The foregoing bond approved this 19th day of  
March, 1915.

JEREMIAH NETERER,

United States District Judge. [185]

[Indorsed]: Appeal Bond. Filed in the U. S.  
District Court, Western Dist. of Washington, North-  
ern Division, Mar. 19, 1915. Frank L. Crosby,  
Clerk. By Ed. M. Lakin, Deputy. [186]



*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libelant,

vs.

The Schooner "OCEANIA VANCE," Her Tackle,  
Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

### **Assignments of Error.**

The above-named claimant, Coast Shipping Company, a corporation, assigns for error in the findings, conclusions and decree of the District Court in the above-entitled cause, that the Learned Judge erred as follows:

1. In finding that the tug "Sea Lion" continuously sounded the proper signal from the time of entering the fog until the time of the collision.

2. In finding and deciding that upon hearing the signal of the "Oceania Vance" just prior to the collision, the "Sea Lion" stopped its engines and blew its tow signal.

3. In holding and deciding that the "Sea Lion" stopped its engines as soon as those on board the "Sea Lion" heard the "Oceania Vance" give its signal.

4. In holding and deciding that at the time the captain of the tug "Sea Lion" gave the signals to stop, to back, to go ahead, he called to the lookout on the "Oceania Vance" to put the wheel of the schooner over.

5. In holding and finding that good seamanship required that the wheel of the schooner be put over.  
[187]

6. In holding and deciding that the "Oceania Vance," at the time of the collision, was going at a speed to exceed seven miles an hour.

7. In holding and deciding that a strong breeze was blowing at a moderate rate of speed up to the time of the collision.

9. In holding and finding that the place of the collision was a place where ships were frequently passing.

10. In holding and finding that the acts of the officers of the "Sea Lion" at and about the time of the collision were acts *in extremis* and not imputable to them as a fault.

11. In failing to hold and find that said tug was in fault in failing, when it started to back, to give the proper signal to show that it was backing.

12. In failing to hold and find that said tug was negligent in that when it stopped it was then backed and then started forward, the course of the schooner not having been changed.

13. In failing to find that the tug was at fault in that it violated Article XVI of the International Rules to Prevent Collisions, contained in the Act of August 19, 1890, in that said tug did not, upon hear-

ing apparently forward of her beam, the fog signal of the "Oceania Vance," the position of which was not ascertained, stop her engines and then navigate with caution until danger of collision was over.

14. In entering final decree of November 4th, 1914, in favor of libelant and against claimant and its said bondsmen; and (a) in entering judgment against claimant and the Fidelity and Deposit Company of Maryland in the sum of \$5,000.00 with interest; and, (b) in entering judgment against claimant and F. A. Bartlett and H. M. Thornton for respondent's costs and disbursements in the sum of One Hundred Seventy-nine and 99/100 Dollars (\$179.99). [188]

15. In refusing to enter judgment in favor of claimant and against libelant dismissing the libel of libelant and for costs against libelant and in favor of claimant.

COAST SHIPPING COMPANY, a Corporation,

Claimant.

BALLINGER & HUTSON,

Proctors for Claimant.

Due and timely service of within assignments of error admitted by receipt of copy thereof this 18th day of March, 1915.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Proctors for Libelant.

[Indorsed]: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 18, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [189]

*In the United States Circuit Court of Appeals,  
Ninth Circuit.*

No. 4046.

COAST SHIPPING COMPANY, a Corporation,  
Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,  
Appellee.

**Notice [of Filing of Stay Bond].**

To Puget Sound Tug-Boat Company, a Corporation,  
Appellee Above Named, and to Messrs. Hughes,  
McMicken, Dovell & Ramsey, Proctors for Said  
Appellee:

You, and each of you, are hereby notified that Coast Shipping Company, a corporation, the above-named appellant, has this day filed a bond in the sum of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00) staying execution of final decree in the above-entitled cause in the court below, conditioned as required by law, and that the name and address of the surety on said bond is: Southwestern Surety Insurance Company, a corporation, E. Lamping, Agt., and R. G. Denney, its attorney in fact, care George B. Lamping & Company, 201 and 250 Colman Building, Seattle, Washington.

Dated at Seattle, Washington, March 19th, 1915.

BALLINGER & HUTSON,

Proctors for Appellant.

Copy of within Notice received this 18th day of March, 1915.

HUGHES, McM. D. & L.,  
Proctors Appellee.

[Indorsed] Notice. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 22, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [190]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

Steamer "OCEANIA VANCE," Her Tackle, Apparell and Furniture,

Respondent,

**Order to Transmit Original Exhibits.**

Now, on this 1st day of April, 1915, upon motion of Messrs. Ballinger & Hutson, Proctors for Claimant and Appellant, and for sufficient cause appearing, it is ordered that Libelant's Exhibits "A" and "B," filed and introduced as evidence upon the trial of this cause, be by the clerk of this court, forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER,  
District Judge.



[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, April 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [191]

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*In the United States Circuit Court of Appeals,  
Ninth Circuit.*

No. —.

COAST SHIPPING COMPANY, a Corporation,  
Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,  
Appellee.

**Citation [Copy].**

The President of the United States of America, to Puget Sound Tug-Boat Company, a Corporation, Libellant and Appellee in the Above-entitled Cause, and to Messrs. Hughes, McMicken, Dovell & Ramsey, Its Proctors:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, whereof the Coast Shipping Company, a corporation, claimant below, is appellant, and you are appellee, to show cause, if

any there be, why the decree rendered against appellant as in said appeal, should not be granted, and why speedy justice should not be done for the parties in the behalf.

WITNESS The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of March, A. D. 1915.

JEREMIAH NETERER,  
Judge, United States District Court for the Western  
District of Washington, Northern Division.

[Seal]                      Attest: FRANK L. CROSBY,  
Clerk of Said Court. [192]

**Return on Service of writ.**

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein-named Hughes, McMicken, Dovell & Ramsey, by leaving a copy with Otto B. Rupp, a member of the firm, by handing to and leaving a true and correct copy thereof with Otto B. Rupp, personally, at Seattle, in said District on the 18th day of March, A. D. 1915.

Fees: \$2.12.

JOHN M. BOYLE,  
U. S. Marshal.  
By A. Rooks,  
Deputy.

[Indorsed]: No. 4046. Original. In the United States Circuit Court of Appeals, Ninth Circuit, Coast Shipping Company, a Corporation, Appellant,

vs. Puget Sound Tug-Boat Company, a Corporation, Appellee. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 18, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Ballinger & Hutson, Attorneys for Appellant. 529-530-532-533. Pioneer Building, Seattle. [193]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libelant,

vs.

Steamer "OCEANIA VANCE," Her Tackle, Apparel and Furniture,

Respondent.

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

**Praeceptum for Apostles.**

To the Clerk of the Above-entitled Court:

Please make and certify and forward to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, for filing therein, the following papers filed in the above-entitled cause and court, to wit:

1. Caption, exhibiting the proper style of the court and the title of the cause, a copy whereof is herewith placed in your hands.

2. Names and addresses of counsel, statement of which is herewith filed with you.
3. Statement required by the rules of the United States Circuit Court of Appeals for the Ninth Circuit.
4. Libel.
5. Appearance.
6. Stipulation for costs.
7. Praeipe for monition.
8. Monition and return thereon.
9. Claim.
10. Claimant's appearance.
11. Claimant's stipulation for costs.
12. Stipulation for release of vessel on bond.
13. Bond for release of vessel.
14. Answer of Coast Shipping Company.
15. Order of reference.
16. Order continuing over term, dated May 6, 1913.
17. All testimony and other proofs produced in the cause; the same being that reported and filed by the Commissioner. [194]
18. Memorandum decision of the court.
19. Cost bill and notice to tax costs.
20. Final decree.
21. Order fixing bond on appeal.
22. Notice of appeal.
23. Bond on appeal.
24. Assignments of error.
25. Notice of filing bond on appeal.
26. Citation and return.
- ~~27. Orders enlarging time for filing record.~~
28. This praeipe.

Dated at Seattle, Washington, March 25, 1915.

BALLINGER & HUTSON,

Proctors for Claimant.

[Indorsed]: Praeceptum for Apostles. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [195]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Libellant,

vs.

Steamer "OCEANIA VANCE," Her Tackle, Apparel and Furniture,

Respondent,

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

**Certificate of Clerk U. S. District Court to Apostles,  
etc.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 195 pages, numbered from 1 to 195, inclusive, to be a full, true, correct and complete copy of so much of the record,



papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington. [196]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the claimant and appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.)	
for making record, certificate or	
return, 366 folios at 15c.....	\$ 54.90
Certificate of Clerk to transcript of	
record, 4 folios at 15c.....	.60
Seal to said Certificate .....	.20
Certificate of Clerk to Original Ex-	
hibits, 3 folios at 15c.....	.45
Seal to said Certificate .....	.20
Total,	<hr/> 56.35

I hereby certify that the above cost for preparing and certifying record amounting to \$56.35, has been

paid to me *my* Messrs. Ballinger & Hutson, Proctors for Claimant and Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 6th day of April, 1915.

[Seal]

FRANK L. CROSBY,

Clerk United States District Court. [197]

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*In the United States Circuit Court of Appeals, Ninth Circuit.*

No. 4046.

COAST SHIPPING COMPANY, a Corporation,  
Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Appellee.

**Citation [Original].**

The President of the United States of America, to Puget Sound Tug-Boat Company, a Corporation, Libelant and Appellee in the Above-entitled Cause, and to Messrs. Hughes, McMicken, Dovell & Ramsey, Its Proctors:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant

to an appeal filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, whereof the Coast Shipping Company, a corporation, claimant below, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against appellant as in said appeal, should not be granted, and why speedy justice should not be done for the parties in the behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of March, A. D. 1915.

JEREMIAH NETERER,  
Judge, United States District Court for the Western District of Washington, Northern Division.

[Seal]            Attest: FRANK L. CROSBY,  
Clerk of said Court. [198]

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Hughes, McMicken, Dovell & Ramsey, by leaving a copy with Otto B. Rupp, a member of the firm, by handing to and leaving a true and correct copy thereof with Otto B. Rupp, personally, at Seattle, in said District, on the 18th day of March, A. D. 1915.

JOHN M. BOYLE,  
U. S. Marshal.

By A. Rooks,  
Deputy. [199]

[Endorsed]: 4046. Original. In the United States Circuit Court of Appeals, Ninth Circuit. Coast Shipping Company, a Corporation, Appellant, vs. Puget Sound Tug-Boat Company, a Corporation, Appellee. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 18, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

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[Endorsed]: No. 2599. United States Circuit Court of Appeals for the Ninth Circuit. Coast Shipping Company, a Corporation, Claimant of the Schooner "Oceania Vance," Her Tackle, Apparel and Furniture, Appellant, vs. Puget Sound Tug-Boat Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 8, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4046.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Libelant,

vs.

Steamer "OCEANIA VANCE," Her Tackle, Ap-  
parel and Furniture,

Respondent.

COAST SHIPPING COMPANY, a Corporation,  
Claimant.

**Certificate of Clerk U. S. District Court to Original  
Exhibits.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the original exhibits introduced and used upon the hearing and trial of the above-entitled cause, as follows: Libelant's exhibits "A" and "B"; which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above-entitled cause; which said exhibits are so transmitted pursuant to the order of the said Dis-



trict Court, so directing, a copy of which said order will be found on page 191 of the record on appeal in said above-entitled cause.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 6th day of April, 1915.

[Seal]

FRANK L. CROSBY,

Clerk United States District Court.

[Endorsed]: No. 2599. United States Circuit Court of Appeals for the Ninth Circuit. Coast Shipping Company, a Corporation, etc., vs. Puget Sound Tag-Boat Co., a Corporation. Certificate of Clerk U. S. District Court to Libelant's Exhibits "A" and "B," etc. Filed Apr. 8, 1915. F. D. Monckton, Clerk.

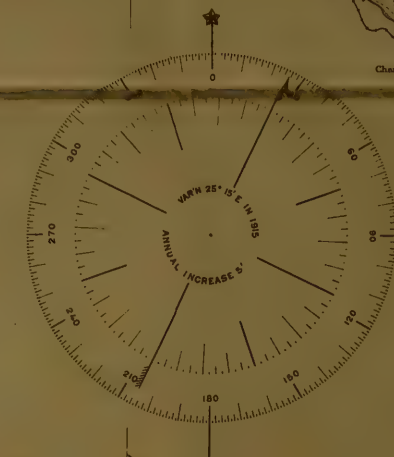
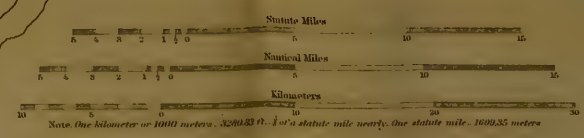


# SEA COAST AND INTERIOR WATERS OF WASHINGTON FROM GRAYS HARBOR TO SEMIAMOO BAY

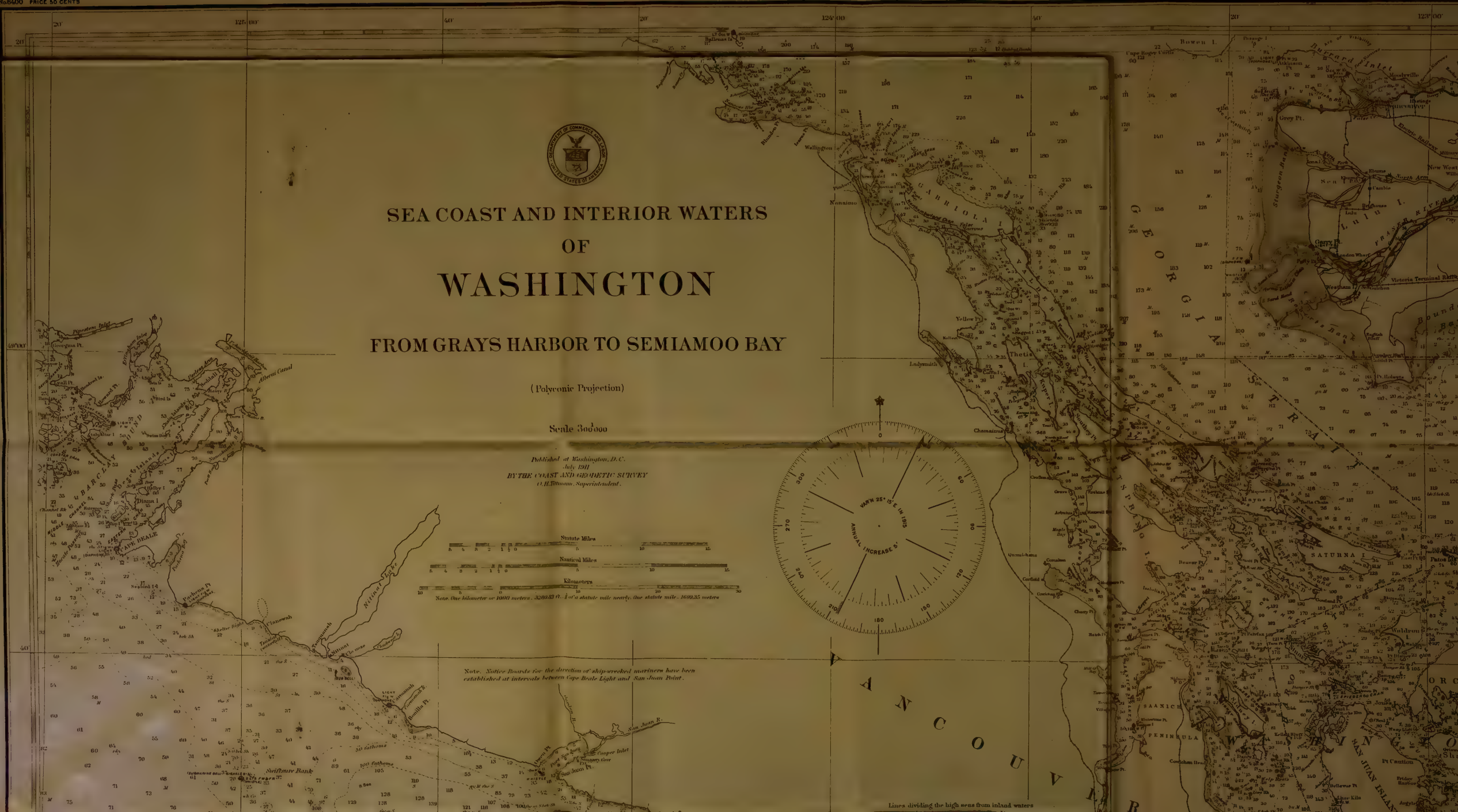
(Polyconic Projection)

Scale 300,000

Published at Washington, D.C.,  
July 1911  
BY THE COAST AND GEODETIC SURVEY  
A. H. Thompson, Superintendent.



Note. Notice Boards for the direction of shipwrecked mariners have been established at intervals between Cape Beale Light and San Juan Point.





# INTERIOR WATERS OF WASHINGTON FROM THE COAST TO SEMIAMOO BAY

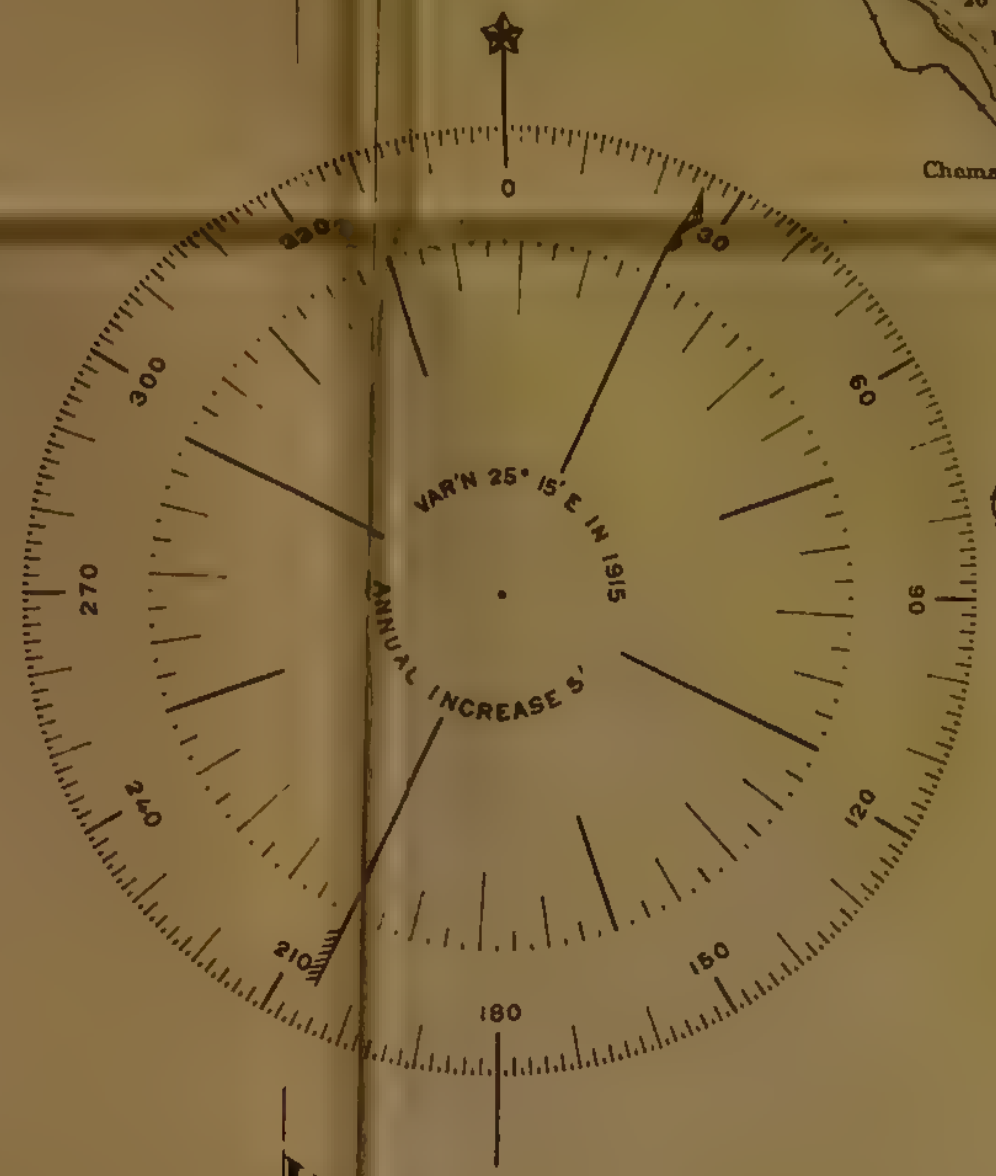
(Projection)

Scale 1:300,000

Washington, D. C.  
1911  
GEODETIC SURVEY  
Superintendent.

Scale in Miles  
0 10 20 30  
Scale in Meters  
0 10 20 30  
One statute mile nearly, one statute mile. 1609.35 meters

Some of shipwrecked mariners have been  
seen at Beale Light and San Juan Point.

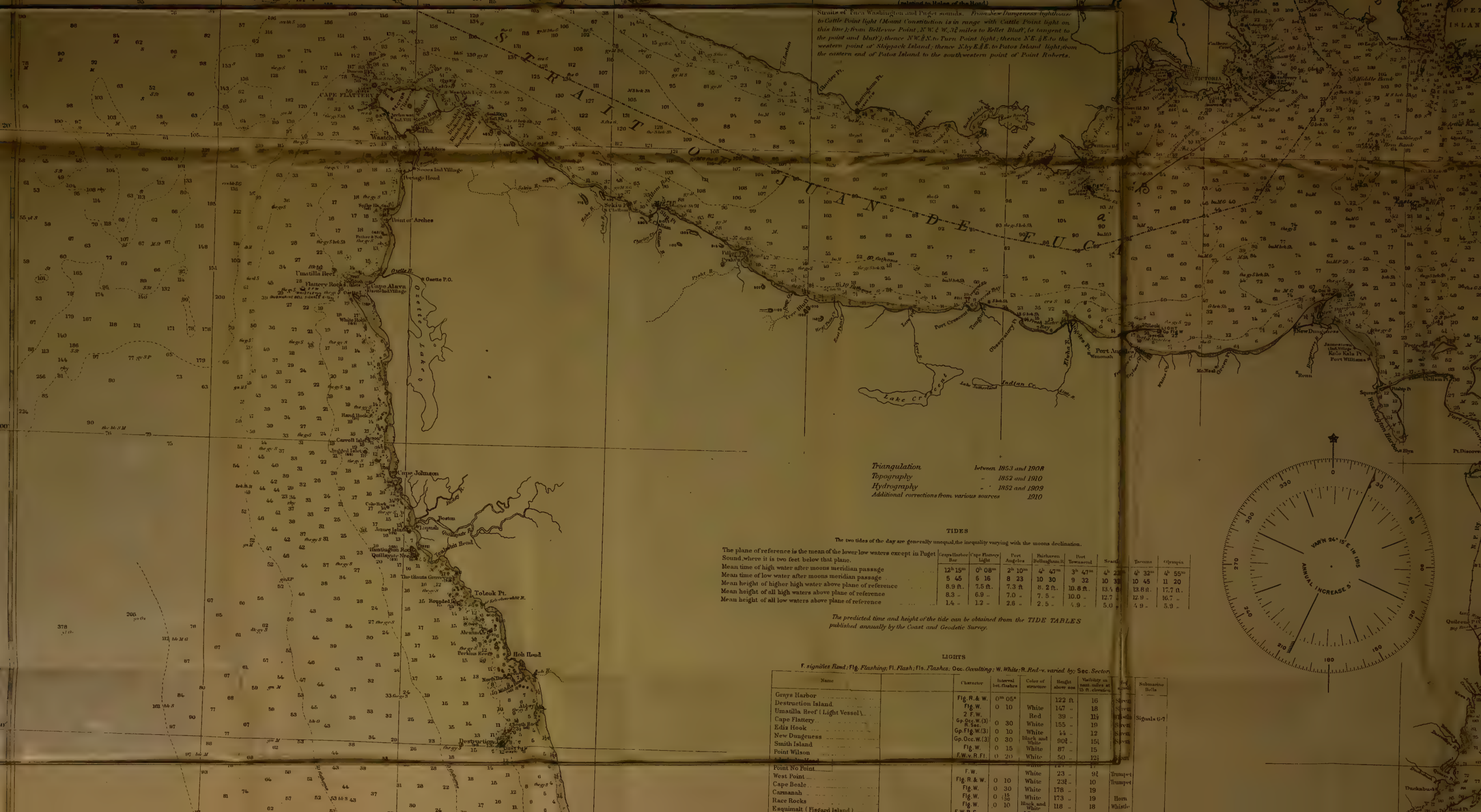


Lines dividing the high seas from inland waters  
(relating to Rules of the Road)

Straits of Furia Washington and Puget sounds.—From New Dungeness lighthouse  
to Cattle Point light (Mount Constitution is in range with Cattle Point light on  
this line); from Bellevue Point, N.W. & W. 3½ miles to Keller Bluff; (a tangent to the  
point and bluff); thence N.W. & N. to Turn Point light; thence N.E. & E. to the  
western point of Shippach Island; thence N.W. & E. to Lotos Island light; from  
the eastern end of Lotos Island to the southwestern point of Point Roberts.







Strait of Juan de Fuca and Puget sounds. From New Dungeness lighthouse to Cattle Point light (Mount Constitution is in range with Cattle Point light on this line); from Bellevue Point, N.W. & W. 3/4 miles to Keller Bluff; (a tangent to the point and bluff); thence N.W. & N. to Turn Point light; thence N.E. & E. to the western point of Skappack Island; thence N.E. & E. to Potos Island light from the eastern end of Potos Island to the southwestern point of Point Roberts.

Triangulation between 1853 and 1908  
Topography " 1852 and 1910  
Hydrography " 1852 and 1909  
Additional corrections from various sources 1910

The two tides of the day are generally unequal, the inequality varying with the moon's declination.

	Cape Flattery Light	Port Angeles	Bar Harbor, Washington	Port Townsend	Seattle	Tacoma	Olympia
Mean time of high water after moon's meridian passage	12 <sup>h</sup> 15 <sup>m</sup>	0 <sup>h</sup> 08 <sup>m</sup>	2 <sup>h</sup> 10 <sup>m</sup>	4 <sup>h</sup> 47 <sup>m</sup>	3 <sup>h</sup> 47 <sup>m</sup>	4 <sup>h</sup> 32 <sup>m</sup>	4 <sup>h</sup> 55 <sup>m</sup>
Mean time of low water after moon's meridian passage	5 45	6 16	8 23	10 30	9 32	10 30	11 20
Mean height of higher high water above plane of reference	8.9 ft.	7.5 ft.	7.3 ft.	8.2 ft.	10.8 ft.	13.4 ft.	13.8 ft.
Mean height of all high waters above plane of reference	8.3	6.9	7.0	7.5	10.0	12.7	12.9
Mean height of all low waters above plane of reference	1.4	1.2	2.8	2.5	4.9	5.0	5.9

The predicted time and height of the tide can be obtained from the TIDE TABLES published annually by the Coast and Geodetic Survey.

LIGHTS

F. signifies Fixed; Fl. Flashing; Fl. Flash; Fls. Flashes; Occ. Occulting; W. White; R. Red; v. varied by Sec. Sector.

Name	Character	Interval bet. flashes	Color of structure	Height above sea	Variability in height	Ref. signal	Submarine bells
Croix Harbor	Fig. R. & W.	0 <sup>m</sup> 05 <sup>s</sup>		122 ft.	16		
Destruction Island	Fig. W.	0 10	White	147	18		
Umatilla Reef (Light Vessel)	2 F. W.		Red	39	11 1/2		Signals 0-7
Cape Flattery	Gp. Sec. W. (3)	0 30	White	155	19		
Edis Hook	Gp. Fl. & W. (3)	0 10	White	44	12		
New Dungeness	Gp. Occ. W. (3)	0 30	Black and white	904	15 1/2		
Smith Island	Fig. W.	0 15	White	87	15		
Point Wilson	F. W. & R. Fl.	0 20	White	50	12 1/2		
Point No Point			White	127	17		
West Point	F. W.		White	23	9 1/2		
Cape Beale	Fig. R. & W.	0 10	White	234	10		
Cannannah	Fig. W.	0 30	White	178	19		
Race Rocks	Fig. W.	0 30	White	173	19		
Esquimalt (Fisgard Island)	Fig. W.	0 10	Black and white	118	18		







Triangulation between 1853 and 1908  
Topography " 1852 and 1910  
Hydrography " 1852 and 1909  
Additional corrections from various sources 1910

TIDES

The two sides of the day are generally unequal, the inequality varying with the moon's declination.

	Grays Harbor	Cape Flattery	Port Angeles	Port Townsend	Seattle	Tacoma	Olympia
Mean time of high water after moon's meridian passage	12 <sup>h</sup> 15 <sup>m</sup>	0 <sup>h</sup> 08 <sup>m</sup>	2 <sup>h</sup> 10 <sup>m</sup>	4 <sup>h</sup> 47 <sup>m</sup>	3 <sup>h</sup> 47 <sup>m</sup>	4 <sup>h</sup> 22 <sup>m</sup>	4 <sup>h</sup> 55 <sup>m</sup>
Mean time of low water after moon's meridian passage	5 45	6 16	8 23	10 30	9 32	10 33	11 20
Mean height of higher high water above plane of reference	8.9 ft.	7.5 ft.	7.3 ft.	8.2 ft.	10.8 ft.	13.4 ft.	17.7 ft.
Mean height of all high waters above plane of reference	8.3 "	6.9 "	7.0 "	7.5 "	10.0 "	12.7 "	16.7 "
Mean height of all low waters above plane of reference	1.4 "	1.2 "	2.6 "	2.5 "	4.9 "	5.0 "	5.9 "

The predicted time and height of the tide can be obtained from the TIDE TABLES published annually by the Coast and Geodetic Survey.

LIGHTS

F. signifies fixed; Flg. flashing; Fl. flash; Fls. flashes; Occ. occulting; W. white; R. red; v. varied; by Sec. Sector.

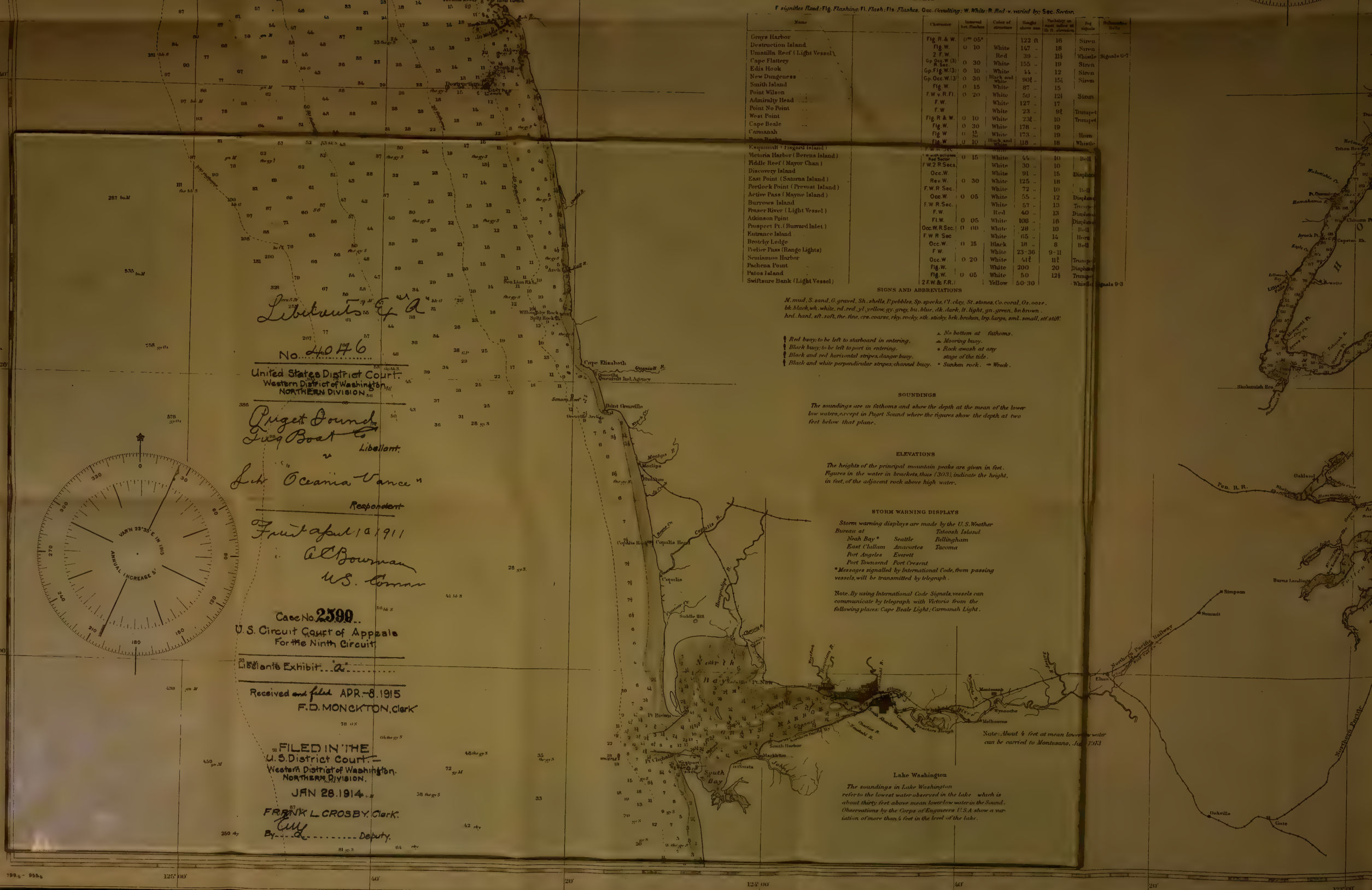
Name	Characteristic	Interval bet. flashes	Color of structure	Height above sea	Visibility in naut. miles at 15 ft. elevation	Log signal	Submarine bells
Grays Harbor	Flg. R. & W.	0 <sup>m</sup> 05 <sup>s</sup>		122 ft.	16	Siren	
Destruction Island	Flg. W.	0 10	White	167 "	18	Siren	
Umatilla Reef (Light Vessel)	2 F. W.		Red	39 "	11 $\frac{1}{2}$	Whistle	
Cape Flattery	Gp. Occ. W. (3)	0 30	White	155 "	19	Siren	
Edia Rock	Gp. Flg. W. (3)	0 10	White	44 "	12	Siren	
New Dungeness	Gp. Occ. W. (3)	0 30	Black and White	90 $\frac{1}{2}$ "	15 $\frac{1}{2}$	Siren	
Smith Island	Flg. W.	0 15	White	87 "	15	Siren	
Point Wilson	F.W.v.R.Fl.	0 20	White	50 "	12 $\frac{1}{2}$	Siren	
Admiralty Head	F.W.		White	127 "	17		
Point No Point	F.W.		White	23 "	9 $\frac{1}{2}$	Trumpet	
West Point	Flg. R. & W.	0 10	White	23 $\frac{1}{2}$ "	10	Trumpet	
Cape Beale	Flg. W.	0 30	White	178 "	19		
Cannanah	Flg. W.	0 15	White	173 "	19	Horn	
Race Rocks	Flg. W.	0 10	Black and White	118 "	18	Whistle	
Esquimalt (Fisgard Island)	F.W.R. Sec.		White	67 "	10		
Victoria Harbor (Bereas Island)	W. with eclipses	0 15	White	44 "	10	Bell	
Fiddle Reef (Mayor Chan)	Red Sector		White	30 "	10		
Discovery Island	F.W.2 R Secs.		White	30 "	10		
East Point (Sandra Island)	White		White	51 "	16	Diaphane	
Portlock Point (Prevost Island)	Rev. W.	0 30	White	125 "	18		
Active Pass (Mayne Island)	F.W.R. Sec.		White	72 "	10	Bell	
Burrows Island	Occ. W.	0 05	White	55 "	12	Diaphane	
Fraser River (Light Vessel)	F.W.R. Sec.		White	57 "	13	Trumpet	
Atkinson Point	F.W.		Red	40 "	13	Diaphane	
Prospect Pt. (Burard Inlet)	Fl. W.	0 05	White	108 "	16	Diaphane	
Entrance Island	Occ. W.R. Sec.	0 10	White	28 "	10	Bell	
Brochy Ledge	F.W.R. Sec.		White	65 "	14	Horn	
Forster Pass (Range Lights)	Occ. W.	0 15	Black	18 "	8	Bell	
Semiamoo Harbor	F.W.		White	23-36 "	9-11		
Pachena Point	Occ. W.	0 20	White	41 $\frac{1}{2}$ "	11 $\frac{1}{2}$	Trumpet	
Patos Island	Flg. W.		White	200 "	20	Diaphane	
Swiftsure Bank (Light Vessel)	Flg. W. & F.R.	0 05	White	50 "	12 $\frac{1}{2}$	Trumpet	

SIGNS AND ABBREVIATIONS

M. mud, S. sand, G. gravel, Sh. shells, P. pebbles, Sp. specks, Cl. clay, St. stones, Co. coral, Oz. ooze.  
bk. black, wh. white, rd. red, y. yellow, gy. gray, bu. blue, dk. dark, lt. light, gn. green, br. brown.  
hrd. hard, aft. soft, the fine, crs. coarse, rly. rocky, stk. sticky, brk. broken, try. large, smt. small, stf. stiff.

- Red buoy, to be left to starboard in entering.
- Black buoy, to be left to port in entering.
- Black and red horizontal stripes; danger buoy.
- Black and white perpendicular stripes; channel buoy.
- No bottom at fathoms.
- Mooring buoy.
- Rock awash at any stage of the tide.
- Sunken rock. Wreck.





F. signifies Flood, Fl. Flashing, Fl. Flash, Fl. Flash, Occ. (Occulting), W. White, R. Red, V. varied by Sec. Section.

Name	Character	Interval between flashes	Color of structure	Height above sea	Velocity of light in ft. per sec.	Signal
Groves Harbor	Fig. R & W	0 05	White	122 ft.	16	Strova
Destruction Island	Fig. W	0 10	White	147	18	Strova
Unadilla Reef (Light Vessel)	2 F.W.	0 30	Red	30	11	Whistle
Cape Flattery	Sp. W. (3)	0 30	White	155	10	Strova
Edis Hook	R. Sec.	0 10	White	44	12	Strova
New Dungeness	Sp. W. (3)	0 30	White	104	15	Strova
Smith Island	Fig. W	0 15	White	87	15	Strova
Point Wilson	F.W. & R. Fl.	0 20	White	50	12	Strova
Admiralty Head	F.W.	0 20	White	127	17	Strova
Point No Point	F.W.	0 20	White	23	9	Tranquil
West Point	Fig. R & W	0 10	White	234	10	Tranquil
Cape Beale	Fig. W	0 30	White	178	19	Tranquil
Carmenah	Fig. W	0 15	White	173	19	Tranquil
Beacon Rock	Fig. W	0 10	White	118	18	Tranquil
Esquimalt (Signal Island)	F.W. & R. Sec.	0 15	White	44	10	Bell
Victoria Harbor (Beren Island)	F.W. & R. Sec.	0 15	White	30	10	Bell
Riddle Reef (Mayor Chan)	Occ. W.	0 30	White	91	15	Diaphan
Discovery Island	Rev. W.	0 30	White	125	18	Diaphan
East Point (Saturna Island)	F.W. & R. Sec.	0 05	White	72	10	Diaphan
Portlock Point (Prevost Island)	Occ. W.	0 05	White	55	12	Diaphan
Active Pass (Mayne Island)	F.W. & R. Sec.	0 05	White	57	13	Diaphan
Burrows Island	F.W.	0 05	White	40	13	Diaphan
Prosser River (Light Vessel)	F.W.	0 05	White	106	16	Diaphan
Adkinson Point	Occ. W. & R. Sec.	0 10	White	28	10	Diaphan
Prospect Pt. (Burard Inlet)	F.W. & R. Sec.	0 10	White	65	14	Diaphan
Brooklyn Lodge	Occ. W.	0 15	Black	18	8	Diaphan
Dwight Pass (Range Lights)	F.W.	0 15	White	23-36	9-11	Diaphan
Newman Harbor	Occ. W.	0 20	White	41	11	Diaphan
Pachena Point	Fig. W.	0 20	White	200	20	Diaphan
Paton Island	Fig. W.	0 05	White	50	12	Diaphan
Swiftsure Bank (Light Vessel)	2 F.W. & R. Sec.	0 10	Yellow	50-30	18	Diaphan

M. mud, S. sand, G. gravel, Sh. shells, Ep. pebbles, Sp. specks, Cl. clay, St. stones, Co. coral, Os. oozes, bk. black, wh. white, rd. red, y. yellow, gy. gray, bl. blue, dk. dark, lt. light, gn. green, br. brown, hnd. hand, sft. soft, the, fine, co. coarse, rky. rocky, st. sticky, brk. broken, bry. large, sm. small, st. still.

Red buoy, to be left to starboard in entering.  
Black buoy, to be left to port in entering.  
Black and red horizontal stripes, danger buoy.  
Black and white perpendicular stripes, channel buoy.  
No bottom at fathoms.  
Mooring buoy.  
Rock awash at any stage of the tide.  
Sunken rock.  
Wreck.

SOUNDINGS

The soundings are in fathoms and show the depth at the mean of the lower low waters, except in Puget Sound where the figures show the depth at two feet below that plane.

ELEVATIONS

The heights of the principal mountain peaks are given in feet. Figures in the water in brackets, thus (303), indicate the height, in feet, of the adjacent rock above high water.

STORM WARNING DISPLAYS

Storm warning displays are made by the U.S. Weather Bureau at  
Tulouah Island  
Noah Bay\* Seattle  
East Chillum Anacortes  
Port Angeles Everett  
Port Townsend Port Crescent  
\* Messages signalled by International Code, from passing vessels, will be transmitted by telegraph.

Note: By using International Code Signals, vessels can communicate by telegraph with Victoria from the following places: Cape Beale Light; Carmenah Light.

Lake Washington

The soundings in Lake Washington refer to the lowest water observed in the lake which is about thirty feet above mean lower low water in the Sound. Observations by the Corps of Engineers U.S.A. show a variation of more than 4 feet in the level of the lake.

Note: About 4 feet at mean lower low water can be carried to Montezuma, Jan. 1913

Libellants & A  
No. 4046

United States District Court,  
Western District of Washington,  
Northern Division.

Puget Sound  
Lug Boat

Libellant  
Lib. Oceania Vance

Respondent

Filed April 19, 1911

Al Bowman  
U.S. Comm.

Case No. 2390

U.S. Circuit Court of Appeals  
For the Ninth Circuit.

Libellants Exhibit A

Received and filed APR-6 1915  
F.D. MONCKTON, Clerk

FILED IN THE  
U.S. District Court,  
Western District of Washington,  
Northern Division,  
JAN 28 1914

FRANK L. CROSBY, Clerk.  
By A. Deputy.





Destruction Island	Fig W	0 10	White	167	18	Siren	Signal 6-7
Umatilla Reef (Light Vessel)	2 F W		Red	39	114	Whistle	
Cape Flattery	Gp. Occ W/3	0 30	White	155	19	Siren	
Ediz Hook	Gp. Fig W/3	0 10	White	44	12	Siren	
New Dungeness	Gp. Occ W/3	0 30	Black and white	101	154	Siren	
Smith Island	Fig W	0 15	White	87	15		
Point Wilson	FW v R Fl	0 20	White	50	124	Siren	
Admiralty Head	FW		White	127	17		
Point No Point	FW		White	23	94	Trumpet	
West Point	Fig R & W	0 10	White	234	10	Trumpet	
Cape Beale	Fig W	0 30	White	178	19		
Carmanah	Fig W	0 15	White	173	19	Horn	
Race Rocks	Fig W	0 10	Black and white	118	16	Whistle	
Esquimalt (Light Vessel)	FW v R Fl	0 15	White	67	10	Bell	
Victoria Harbor (Bereas Island)	FW 2 R Secs		White	30	10		
Middle Reef (Major Chan)	Occ W		White	91	15	Diaphane	
Discovery (Island)	Rev W	0 30	White	125	18		
East Point (Satuma Island)	FW R Sec		White	72	10	H-4	
Portlock Point (Prescott Island)	Occ W	0 05	White	55	12	Diaphane	
Active Pass (Mayne Island)	FW R Sec		White	57	13	Trumpet	
Burrows Island	FW		Red	40	13	Diaphane	
Prancer River (Light Vessel)	FW	0 05	White	108	16	Diaphane	
Atkinson Point	Occ W R Sec	0 09	White	28	10	Bell	
Prospect Pt (Harrard Inlet)	FW R Sec		White	65	14	Horn	
Entrance Island	Occ W	0 15	Black	18	8	Bell	
Brevelly Light	FW		White	23-36	9 11	Trumpet	
Devil Pass (Range Lights)	Occ W	0 20	White	61	11	Diaphane	
Seminole Harbor	Fig W		White	200	20	Diaphane	
Pachena Point	Fig W	0 05	White	50	12	Trumpet	
Palos Island	2 F W & R		Yellow	50-30		Whistle Signals 9-3	

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#### ELEVATIONS

The heights of the principal mountain peaks are given in feet. Figures in the water in brackets, thus (303), indicate the height, in feet, of the adjacent rock above high water.

#### STORM WARNING DISPLAYS

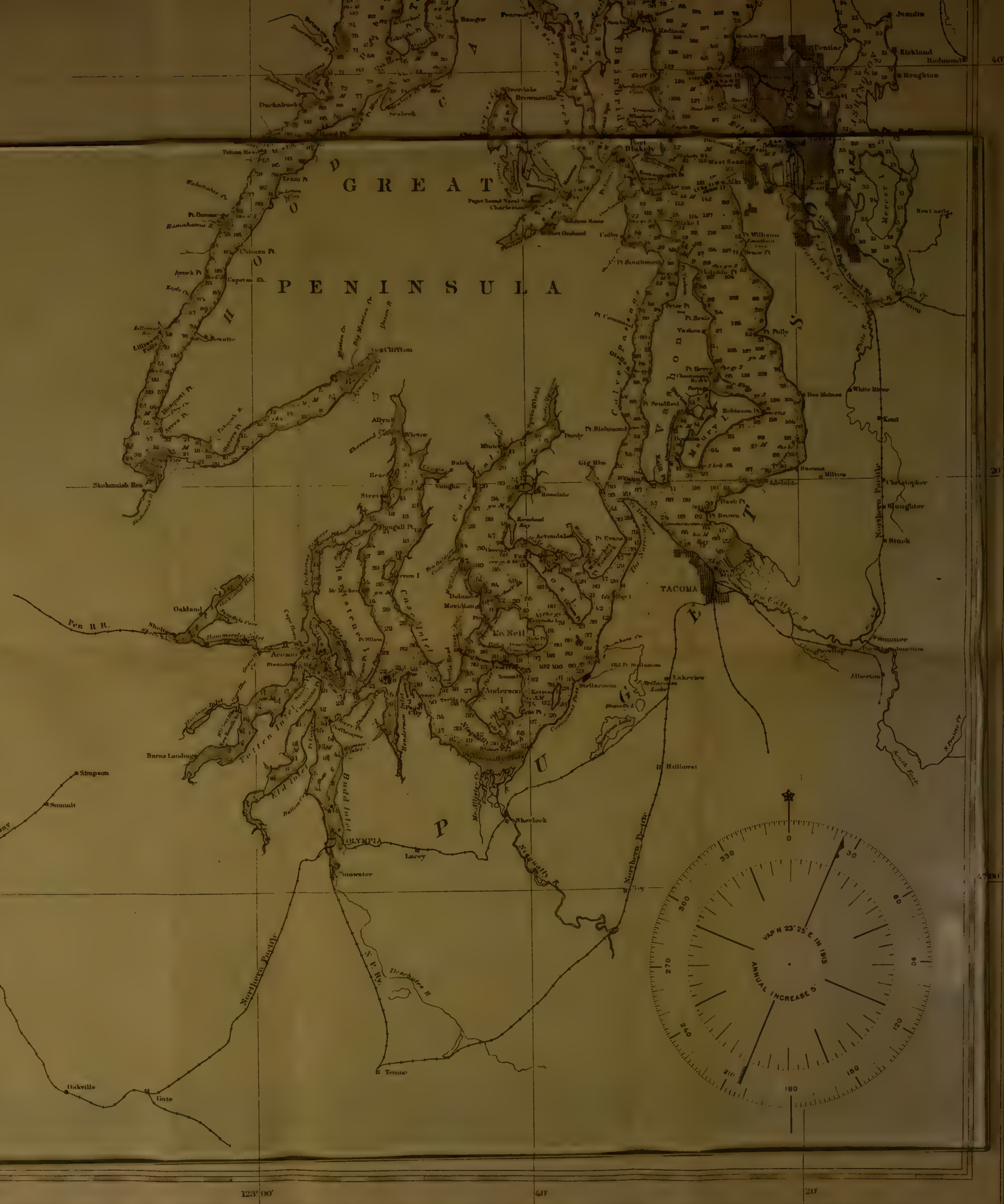
Storm warning displays are made by the U.S. Weather Bureau at  
 Neah Bay, Seattle, Tatoosh Island, Bellingham  
 East Clallam, Anacortes, Tacoma  
 Port Angeles, Everett  
 Port Townsend, Port Crescent  
 \* Messages signalled by International Code, from passing vessels, will be transmitted by telegraph.

Note: By using International Code Signals, vessels can communicate by telegraph with Victoria from the following places: Cape Beale Light, Carmanah Light.

#### Lake Washington

The soundings in Lake Washington refer to the lowest water observed in the lake which is about thirty feet above mean lower low water in the Sound. Observations by the Corps of Engineers U.S.A. show a variation of more than 4 feet in the level of the lake.

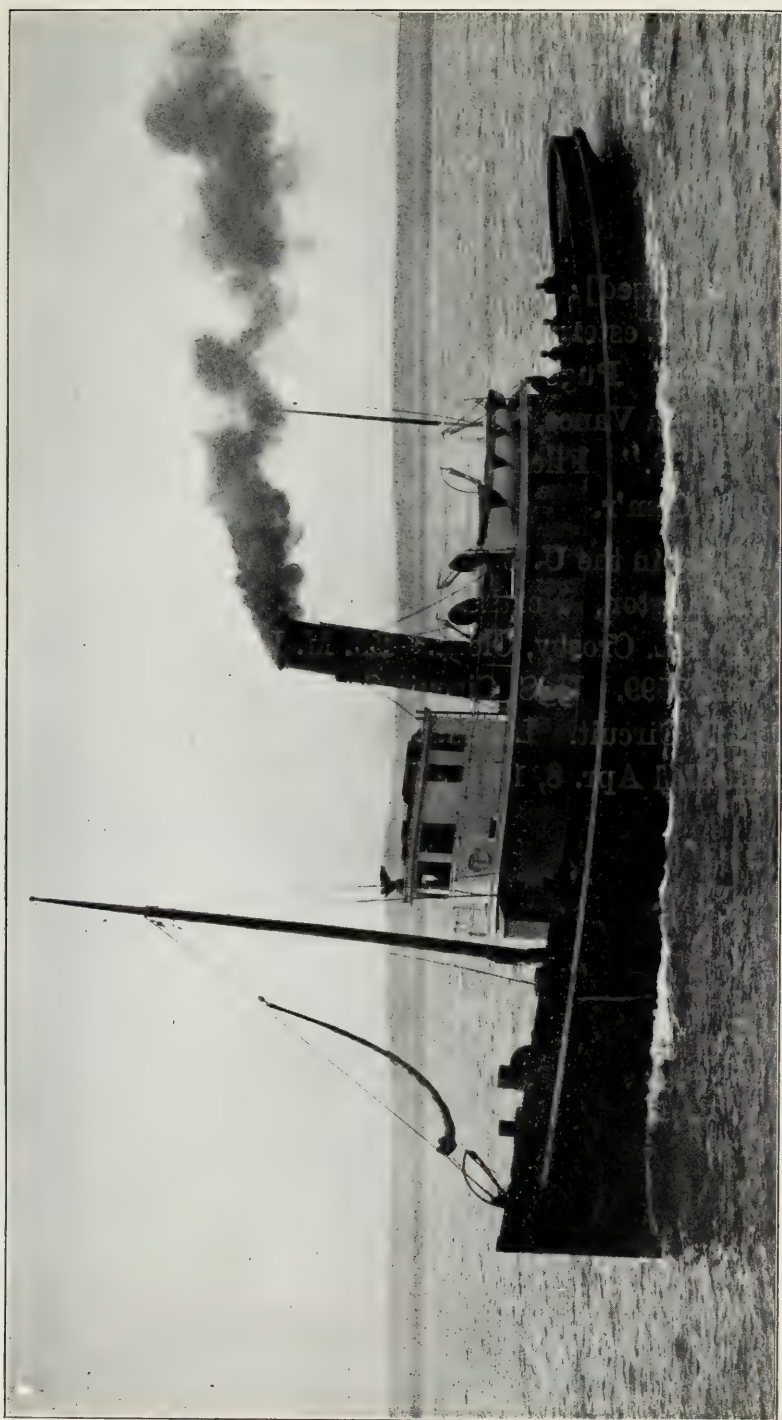
Note: About 4 feet at mean lower low water can be carried to Montezuma, June 1913







**Libelant's Exhibit "B."**



[Endorsed]: No. 4046. United States District Court, Western District of Washington, Northern Division. Puget Sound Tug-Boat Co., Libellant, vs. "Oceania Vance," etc., Respondent. Libellant's Exhibit "B." Filed April 26, 1912. A. C. Bowman, U. S. Com'r.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 28, 1914. Frank L. Crosby, Clerk. Ed. M. Lakin, Dep.

No. 2599. U. S. Circuit Court of Appeals for the Ninth Circuit. Libellant's Exhibit "B." Received and filed Apr. 8, 1915. F. D. Monckton, Clerk.



United States  
Circuit Court of Appeals

For the Ninth Circuit

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COAST SHIPPING COMPANY, a Corporation,  
Claimant of the Schooner "OCEANIA  
VANCE," Her Tackle, Apparel and Fur-  
niture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Cor-  
poration,

Appellee.

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

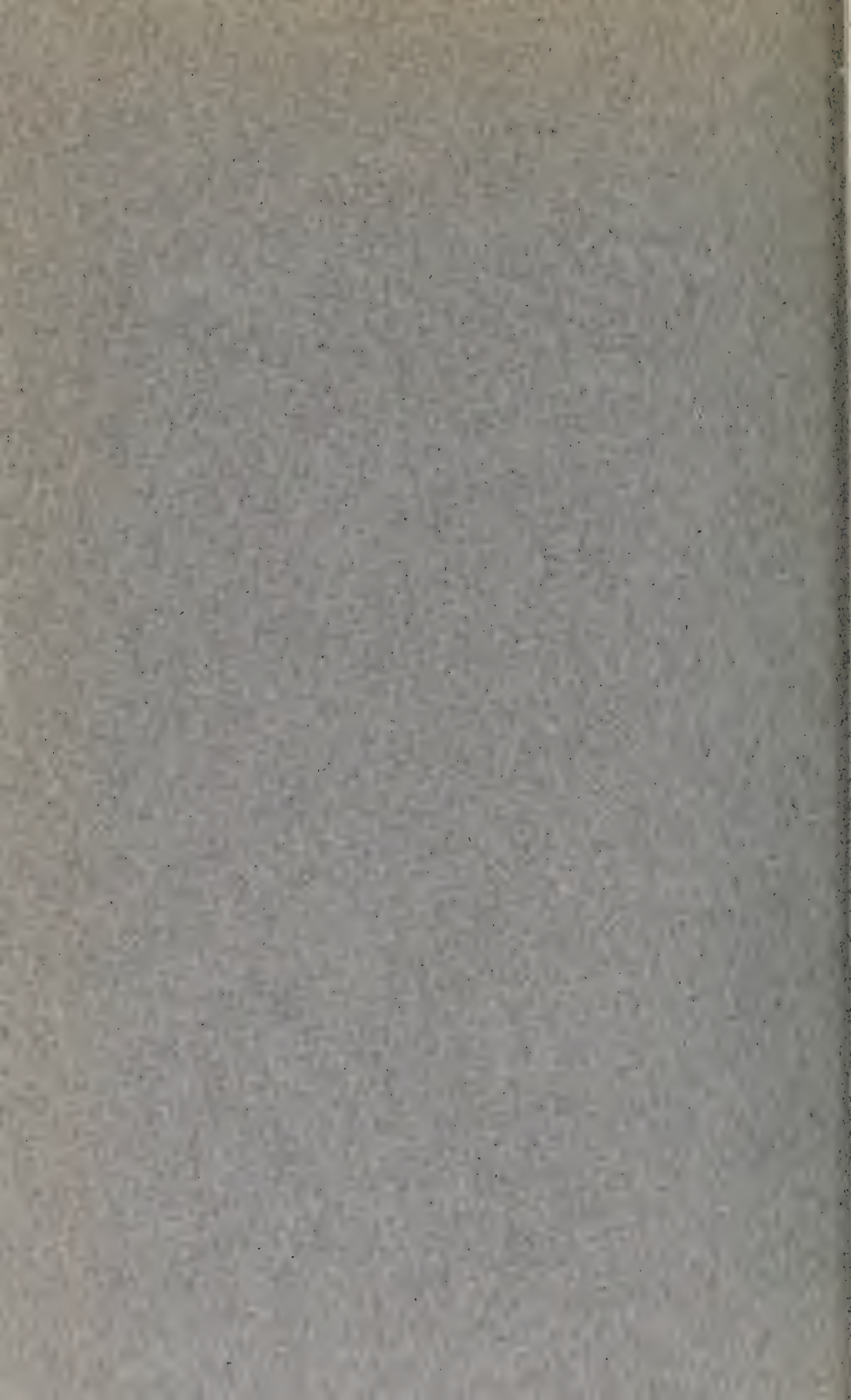
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Brief for Appellant

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HARRY BALLINGER,  
CHARLES T. HUTSON,  
*Proctors for Appellant.*

529-533 Pioneer Building,  
Seattle, Washington.



**No. 2599**

**United States  
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COAST SHIPPING COMPANY, a Corporation,  
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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

---

**Brief for Appellant**

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**STATEMENT OF THE CASE.**

This is a case of libel for collision brought by  
the Puget Sound Tug Boat Company, a corporation,

libelant and appellee, against the schooner "Oceania Vance," her tackle, etc., claiming damages for the loss of the steam tug "Sea Lion" through collision with the Vance. The Coast Shipping Company, corporation, as claimant to the schooner, contested the libel and judgment was rendered by the United States District Court for the Western District of Washington, Northern Division, in favor of appellee and against the claimant and its bondsman in the amount of the bond, towit, the sum of \$5000.00. From this judgment an appeal is prosecuted by the claimant.

### THE PLEADINGS.

The libel in substance alleges: Incorporation of the libelant and its ownership of the tug "Sea Lion," which is described, and that it was of the value of \$31,000; and it is alleged that the "Oceania Vance," whose description is given, is reputed to be owned by the Coast Shipping Company and that it was of the value of \$6,000. (Rec., p. 4.)

The third paragraph is as follows:

### III.

That on the morning of the 9th day of June, 1909, the said tug "Sea Lion" was bound from Waldron Island in the district aforesaid, to Grays Harbor in



the district aforesaid, having in tow the barge "Charger" loaded with rock, and was proceeding on her regular and usual course from said Waldron Island towards the Straits of Juan de Fuca. That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of Juan de Fuca, in ballast under sail. That about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, but a fresh breeze blowing up the Straits of Juan de Fuca, being a fair wind for the said schooner "Oceania Vance," the officers and men in charge of the navigation of the said tug "Sea Lion" heard three blasts of a fog-horn ahead, and thereupon the engines of said tug were immediately slowed down and said tug's headway decreased and a few moments thereafter upon hearing the second signal from a sailing vessel approaching [5] with a fair wind, to-wit, three blasts on a fog-horn, the engines of said tug were reversed, and while the headway of said tug was gone, the said schooner "Oceania Vance," approaching said tug with great speed and with all sails set, ran into, collided with, and sank the said tug "Sea Lion" so that she became and is a total loss, with the loss of all of the personal effects of the officers and crew thereof. That said collision occurred about four miles east by north of Race Rocks near the port of Victoria at the time afore-

said, and that at the time of and preceeding said collision the said "Oceania Vance" was proceeding at a rate of speed in excess of seven knots per hour, and had all of her canvas set and drawing was out of the usual and ordinary course of vessels coming up the Straits of Juan de Fuca with a fair wind such as was blowing at said time. That said schooner, in order to make greater speed under her rig, instead of running straight up the Straits of Juan de Fuca with a fair wind, was tacking back and forth across said Straits with a fair wind so as to utilize the full speed of all of her canvas and was proceeding at an unlawful and immoderate rate of speed for the thick foggy weather then prevailing. That during all of the time up to and prior to said collision, said tug-boat was in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and crew, and the master and crew engaged on board were on the lookout for the protection and safety of said vessel and of her said tow and were constantly and regularly sounding upon her steam whistle the proper signals at the proper times, and proceeding at a moderate rate of speed, indicating that she was a tug vessel having a tow, and said [6] collision was caused without any fault or negligence on the part of the said tug "Sea Lion," or of any of her officers or crew.

(Rec., pp. 5, 6.)

In the fourth paragraph it is alleged that the collision was caused solely by the excessive speed of the "Oceania Vance" and that by the collision the tug "Sea Lion," her boilers, etc., were a total loss. (Rec., pp. 6, 7.)

The fifth paragraph alleges the damage sustained in the sum of \$31,000, and the sixth paragraph alleges that the "Oceania Vance" is within the jurisdiction of the court. (Rec., pp. 7, 8.)

This libel was filed in the court below on August 7, 1909 (Rec., p. 9), and an attachment against the schooner "Oceania Vance" was issued on that day (Rec., pp. 13, 14), and on that day the schooner was seized by the marshal. (Rec., p. 15.) On August 12, 1909, claim was made on behalf of the Coast Shipping Company, owner of the schooner. (Rec., pp. 16, 17.)

On August 27, 1909, by stipulation of the parties, it was agreed that said schooner might be released on the execution of a bond by claimant in the sum of \$5000.00 (Rec., p. 22) and on the same day the bond was given and the vessel released. (Rec., pp. 22, 23.)

On March 28, 1910, the answer of claimant was filed. (Rec., pp. 24-29.) The first and third articles

of the libel were denied for want of knowledge of the truth thereof, and in the third and fourth paragraphs (Rec., pp. 25-7) it is alleged:

### III.

That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of Juan de Fuca in ballast under sail; that at said time she was properly manned and equipped, and had a full complement of officers and seamen aboard, and the vessel was running before the wind and steering straight course for Point Wilson; that at the said time the said "Oceania Vance" was making about five and one-half knots an hour; that about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, and a strong wind blowing up the Straits of said Juan de Fuca, it was difficult to navigate the said schooner "Oceania Vance," and the mechanical fog-horn of the said "Oceania Vance" was being blown at the intervals required by law, suddenly the loom of a vessel was seen about ——— points on the schooner's port-bow, and almost immediately afterwards there came in sight the tug "Sea Lion," sailing free on a course of about ——— and moving through the water at the rate of about seven knots. That immediately thereafter the schooner endeavored to steer so as to get out of the way of the said



“Sea Lion”; that the said “Sea Lion” first reversed its engines and then started to go ahead again and that the said tug “Sea Lion” thereupon ran into, collided with and stuck the said “Oceania Vance” in the stern about the thirteen foot mark. That the said “Oceania Vance” at said time was steering a straight course for Point Wilson, and had sounded fog-signals for a long time prior thereto, and in every way complied with the rules of the road; [26] that when the said “Oceania Vance” and its officers heard the whistle of the said tug “Sea Lion” they did their utmost to steer clear of anything coming near it, and had swung quite a little bit, when the said “Sea Lion” crashed into the said “Oceania Vance.” That the said schooner “Oceania Vance” was proceeding on her usual and regular course, and that the said tug “Sea Lion” was proceeding at an unlawful and immoderate rate of speed for a steam vessel in such thick and foggy weather as then prevailed. That the said collision was in no wise caused by any fault or negligence on the part of the said schooner “Oceania Vance” or any of her officers or crew, and was caused entirely by the fault and negligence and carelessness of the said tug “Sea Lion,” her officers and crew.

#### IV.

That the said collision was caused solely by the

said tug "Sea Lion" starting her engines and going ahead after having stopped the same. That had the said tug "Sea Lion" stopped her engines and then backed there would have been no collision and that said collision was caused solely because the officers of the said tug "Sea Lion" so carelessly and negligently operated the said "Sea Lion" and her engines that it was impossible for the said "Oceania Vance," her officers and crew, to avoid being struck by the said tug "Sea Lion," and that said collision and the damages resulting therefrom was caused solely by the fault and negligence of said tug "Sea Lion," her officers and crew.

The cause was referred to a commissioner to take and report the testimony of the respective parties (Rec., pp. 29, 30), and upon the pleadings and testimony taken the cause was submitted to the court below and determined by it in favor of appellee, the court awarding to appellee judgment against appellant and its bondsman in the sum of \$5000 and costs (Rec., pp. 170-172), from which decree this appeal was taken.

### SPECIFICATION OF ERRORS.

The claimant, Coast Shipping Company, appellant herein, assign for error in the findings, conclusions and decree of the district court in this cause, that the learned judge thereof erred as follows:

1. \* \* \*

2. In finding and deciding that upon hearing the signal of the "Oceania Vance" just prior to the collision, the "Sea Lion" stopped its engines and blow its tow signal.

3. In holding and deciding that the "Sea Lion" stopped its engines as soon as those on board the "Sea Lion" heard the "Oceania Vance" give its signal.

4. In holding and deciding that at the time the captain of the tug "Sea Lion" gave the signals to stop, to back, to go ahead, he called to the lookout on the "Oceania Vance" to put the wheel of the schooner over.

5. In holding and finding that good seamanship required that the wheel of the schooner be put over.

6. In holding and deciding that the "Oceania Vance" at the time of the collision, was going at a speed to exceed seven miles an hour.

7. \* \* \*

8. \* \* \*

9. \* \* \*

10. In holding and finding that the acts of the officers of the "Sea Lion" at and about the time of

the collision were acts *in extremis* and not imputable to them as a fault.

11. In failing to hold and find that said tug was in fault in failing, when it started to back, to give the proper signal to show that it was backing.

12. In failing to hold and find that said tug was negligent in that when it stopped it was then backed and then started forward, the course of the schooner not having been changed.

13. In failing to find that the tug was at fault in that it violated Article XVI of the International Rules to Prevent Collisions, contained in the Act of August 19, 1890, in that said tug did not, upon hearing apparently forward of her beam, the fog signal of the "Oceania Vance," the position of which was not ascertained, stop her engines and then navigate with caution until danger of the collision was over.

14. In entering final decree of November 4th, 1914, in favor of libelant and against claimant and its said bondsmen; and

(a) In entering judgment against claimant and the Fidelity and Deposit Company of Maryland in the sum of \$5000.00 with interest; and

(b) In entering judgment against claimant and F. A. Bartlett and H. M. Thornton for respondent's



costs and disbursements in the sum of One Hundred Seventy-nine and 99/100 Dollars (\$179.99).

15. In refusing to enter judgment in favor of the claimant and against libelant dismissing the libel of libelant and for costs against libelant and in favor of claimant.

### ARGUMENT.

We will group these assignments for the purpose of argument under five points, as follows:

1. The speed of the "Oceania Vance" was not excessive.

2. The schooner was not improperly navigated and particularly there was no negligence in failing to put the wheel over just prior to the collision.

3. The tug was at fault in that the engines were not stopped immediately upon first hearing the fog signals of the Vance apparently forward of the beam, the position of the schooner not being then known by those on board the tug.

4. The tug was negligent on starting back in failing to signal that manoeuver for the information of those in charge of the schooner.

5. The tug was at fault in that when the engines were stopped they were reversed for a time and then started ahead at full speed.

## I.

*The speed of the "Oceania Vance" was not excessive.*

This point requires a consideration of two questions: (a) the actual speed of the vessel; and (b) whether that speed was in fact excessive. The first is a question of fact. The second is a matter of inference.

(a) The actual speed of the vessel cannot, of course, definitely be known. The estimates thereof are those of the witnesses for libellant who were aboard the tug and those of the witnesses for the claimant who were on board the schooner. Those on board the tug saw the schooner for a very brief space of time, and while it was covering a distance from 60 feet to 40 fathoms (240 feet). (Rec., pp. 36, 60, 88, 97, 106.) Some of these witnesses based their estimate upon the speed made by the Vance after the crew of the tug were taken on board, and some upon statements which they say were made by the captain or mate of the Vance at that time. Typical of the testimony above mentioned is that of Captain Lovejoy, who testified (Rec. 41) that 15 or 20 minutes after leaving the scene of the collision the Vance ran about  $3\frac{1}{2}$  knots during the first half hour, as shown by the patent log. Captain Stream, however, who was first mate on the tug, estimated

such speed as four or five knots per hour (Rec., p. 91) and stated that the captain of the schooner stated that just before the collision they were making three and a half or four knots per hour. The captain of the Vance testified (Rec., p. 158) that the patent log "is not reliable and it was over-running, and I just used it only as a check; I was not using it to run distances with whatever."

There is no other basis for the decision of the lower court that the Vance was running in excess of seven miles per hour except the testimony of the man at the wheel of the tug (Rec., p. 108) that judging from the breeze and the sails set and that the Vance was in ballast, he estimated the speed at seven or eight knots per hour. He testified, however (Rec., p. 107), "the mate gave a signal to the engineer, but I do not know about that; I was hauling the wheel over." And elsewhere in his testimony are suggestions from which it is fair to assume that he was occupied with his duties at the time and had little opportunity to pay attention to the speed of the schooner. In any case, it would have been very difficult for any one on board the tug to estimate the speed of the schooner approaching directly upon them and in the limited time during which it was visible. In its opinion the lower court states that in a former hearing the captain immediately after the collision testified that the schooner was

“going at a speed of six and one-half or seven knots an hour, and he had concluded this after an examination of the log \* \* \* ” (Rec., p. 163.) Captain Scott did make that statement a few days after the collision, but he explains (Rec., p. 152) that at that time he had not figured up his distance; that he had been too busy; also that “I don’t know what she logged, because the log was unreliable and I would use it only in case I wanted to in short tacks.” (Rec., p. 151.)

The distance from Cape Flattery to the place of collision is a little under fifty miles. (Rec., p. 142.) The schooner passed Cape Flattery the evening before the collision at a time variously estimated at 8.30 p. m. (Rec., p. 126) and 8 p. m. (Rec., p. 142.) The collision occurred between 6 and 7 a. m. The only witness who fixes the exact time is Christian Anderson, one of the witnesses for libelant, who was at the wheel of the tug at the time of the collision and who, as he left the wheelhouse, observed that it was twenty minutes to seven. (Rec., p. 105.) Since all the witnesses testify that the tug sank within two or three minutes after the collision, the time is very definitely fixed by this witness and it is apparent that the Vance had taken approximately ten hours to go a distance under fifty miles. This circumstance corroborates the testimony of the mate of the



schooner (Rec., pp. 127, 133, 134) that at the time of the collision the Vance was making about five knots and had been throughout the night, and of like testimony given by the captain of the Vance. (Rec., p 142.)

Something is said in the testimony concerning the sail carried by the Vance. The captain of the tug states that the Vance had up "all her lower sails and the mizzen gaff topsail," and that they were full and drawing. Smith, chief engineer of the tug, states that all the schooner's lower sails were set. He did not notice the topsail. Stream, first mate on the tug, states that all sails were set except the fore and main topsails (Rec., p. 96) and the halliards were let go. (Rec., p. 88.) Anderson, at the wheel of the tug, states that the Vance had all sails set except the fore topsail. (Rec., p. 108.)

On the other hand, Williams, the mate of the schooner, states that all the topsails were down (Rec., pp. 126, 127) and but one sail was drawing. The captain of the schooner states (Rec., pp. 156-157) that at the time of the collision he had up the courses, foresails, jib and spanker topsail; that some sails had been taken in before the collision and that the mizzen topsail was set, though whether that sail was taken in before the collision is not clear.

The wind is described by the various witnesses as a "fresh breeze" and the schooner was in ballast. What the condition of the tide was is not disclosed, and while it appears that the particular neighborhood of the collision is one where the currents were strong and there were many tide rips (Rec., p. 120), so that a tug with tow could not keep its course without traveling at least four or five knots per hour (Rec., p. 121), it is not shown how the schooner would be affected in her course by such tidal conditions, either as it might affect her speed or would render it necessary that she make a given speed in order to hold her course.

We have endeavored in what has gone before to summarize all the material testimony upon the subject of the speed of the Vance, and from it all there is nothing conclusive as to her speed except the distance which she traversed of less than fifty miles in about ten hours. This would make her average speed under five miles per hour. It would seem, therefore, that the lower court erred in holding that she was sailing in excess of seven miles per hour.

(b) There is no testimony from which it may be concluded that the speed of the schooner was in any event excessive. To form a conclusion upon that point it would be necessary to know and understand all the elements entering into the question. As we

have said, the location was one of strong currents and of many tide rips. The vessel was rather close to the land. Whether the schooner could safely have been navigated at a slower gait is not shown. Since the burden is upon the libellant to establish a negligent rate of speed, it would seem that that burden has not been sustained by it.

There are cases in which it has been held that a lesser rate of speed in foggy weather was negligent. Each case must, of course, depend upon its own separate facts. No court so far as we are aware has fixed any definite rate of speed as being excessive except in connection with special circumstances shown in such case. Those authorities, therefore, are of no value in determining the case at bar.

(See *The Eagle Point*, 114 Fed. 971.)

## II.

*The schooner was not improperly navigated, and particularly there was no negligence in failing to put the wheel over just prior to the collision.*

It is claimed by the appellee and was held by the lower court that the schooner was in fault in that its wheel was not put over, which, it is said, good seamanship required.

This conclusion is based upon certain testimony set forth in the record and which will now be referred to.

Captain Lovejoy of the tug testified (Rec., p. 37) that after the engines of the tug had been reversed he (Captain Lovejoy) tried to clear the vessel by going ahead full speed, and he "hooked her on full speed ahead, and I motioned to the man on the look-out of the schooner to put his wheel over to clear us." What motion he made is not otherwise described, nor does it appear from the distance between the vessels, the situation of the captain of the tug or the situation of anyone on board the schooner that the motion could be seen, that it was necessarily understood, or that there was time in which to execute the manoeuver referred to. Captain Roos, a retired master mariner, in answer to hypothetical questions propounded by libelant, indicates that the wheel should be put hard over with a view to bringing the schooner into the wind. His testimony is not very definite, but so much can be inferred from it. (See Rec., pp. 111-118.)

The most definite testimony given on behalf of the libelant upon this point is that of Captain Stream, who was first mate of the tug at the time of the collision, and who has served on the Oceania Vance on one cruise since that time. (Rec., p. 97.)



As a witness for libellant, on cross-examination (Rec., p. 96), he testified:

Q. Well, now, what would the captain of the schooner have done with a vessel that close to each other and getting closer to each other every second, to have changed the results?

A. Well, I don't know what he could have done. I know what he could have tried to have done.

Q. What in your opinion would you have tried to have done?

A. Put my helm down and let her come into the wind, put all hands on the spanker-sheet so as to haul her around.

Q. How long would it have taken to have done that?

A. That would have taken some time; her sails are heavy sails.

On redirect examination (Rec., p. '98) he testified:

Q. And with her sails in that position, she would put her helm hard aport and that would bring her around with the wind as it was?

A. No. He would have to get her spanker in before she would have gone very far; after she got

around so far she would spill on the spanker, and the weight of the sails would have kept her there, but if he could have got the spanker in and sheeted home, as they call it, and let go of the head sails, she would have come around herself.

Q. Putting the wheel hard done?

A. Yes, sir; she would have come to a certain distance, but beyond that she would not have come with the sheets and sails in the position that they were.

Captain Scott of the schooner testified as follows:

Q. Well, when you saw this towboat, what did you do then?

A. I did nothing but keep on as I was going.

Q. Why?

A. Because there was nothing to do. I did not know what he was doing. According to the rule of the road I had to keep on.

Q. Do you know whether or not he reversed his engine?

A. I do not.

Q. You do not know that of your own knowledge?

A. That I only know by hearsay.

Q. Did the captain tell you he had reversed his engines?

A. Yes, he told be he had.

Q. Did he give any signals indicating that he had reversed his engines?

A. No.

Q. What would be the signal if he had reversed his engines?

A. Three short blasts of the whistle.

Q. If they had given any such signal what would you have done?

A. I would have endeavored to keep ahead of the towboat, and I would have endeavored to put my helm hard aport and tried to come around this way and get ahead of her; I would have known then that she was going astern.

Q. As far as you could judge, as far as you knew, she was coming on ahead?

A. I did not know what he was doing.

Article 20 of the International Rules for Avoiding Collisions (26 Stat. L. 327) provides:

When a steam vessel and a sailing vessel are proceeding in such directions as to involve the risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

Article 21 of the same rules (28 Stat. L. 83) provides:

Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Article 28 (26 Stat. L. 328) provides that three short blasts of a whistle mean "my engines are going at full speed astern."

The situation which confronted those in charge of the schooner was that the tug became visible through the fog but a short distance away, a distance which must have been traversed in but a few seconds. The schooner's sails were on the port side, the wind blowing across the starboard quarter. The change in the course of the schooner would necessitate the putting of the wheel to port and the putting of all hands on the spanker-sheet to haul the vessel around, and that would have taken some time. Doubtless some change could have been made in her course merely by putting the wheel aport, but the vessel would not come about without the change in the position of her sails. Obviously, there was no time for the latter, and the former expedi-



ent might have been disastrous, since the change in the schooner's course would be calculated to nullify any action which the tug might take. The rules cited indicate that it was the duty of the sailing vessel to keep on her course and speed. That duty could be modified only by the appearance of circumstances indicating that such a course would be less safe than some other course. Captain Scott, of the schooner, in that portion of his evidence already quoted, said there was nothing for them to do because they did not know what the tug would do, and here we call attention to the fact that though the engines of the tug were reversed, that fact was not signalled by it to the schooner. We have already called attention to the rule that this fact should have been shown by three short blasts of the tug's whistle. It is not claimed by any person on the tug that this signal was given, though the engines were reversed, and the testimony of Williams, the mate on the schooner, also shows that no signal of any kind was given by the tug to indicate to those on the schooner whether she was going ahead or backing up. (Rec., p. 131.) Considering, then, that the intention of the tug was unknown to those aboard the schooner and that its manoeuvres were in no manner signalled to the schooner, and considering the very short time which elapsed between the time when the vessels came in sight of each

other and the time of the collision, it is obvious that the schooner could have adopted no other course than that prescribed by the rules to "keep her course and speed."

### III.

*The tug was at fault in that the engines were not stopped immediately upon first hearing the fog signals of the Vance apparently forward of her beam, the position of the schooner not being then known by those on board the tug.*

The evidence of the captain of the tug does not correspond exactly with that of the mate of the tug. The captain testified as follows:

Q. Now, when did you first hear the horn, if you heard any, of the "Oceania Vance"?

A. Why, about, I should judge, a minute and a half or two minutes before the collision; possibly a minute and a half.

\* \* \* \* \*

Q. When you first heard the signal of the "Oceania Vance" what did you do?

A. Why, the mate spoke to me. He said there was a sailing vessel. The "Oceania Vance" blew three whistles on a hand horn, and three whistles

indicate that the vessel has the wind abaft the beam, and also three whistles, a long and two short whistles, is a signal allowed by a barge or sailing vessel being towed by a tug, they can make that to show us that they are being towed. I heard the whistle so plainly, and the mate said there was a vessel ahead on the starboard bow, and I said, "Are you sure it is not the barge starting to blow?" and he said, "No, I am quite certain it is ahead; it sounded quite loud," and he answered the whistle right away, and almost immediately she blew another whistle, and then I was satisfied she was right ahead on the starboard bow, and I got into the pilot-house, and the mate stopped her and started to back, and when I got into the pilot-house the bow of the vessel was coming out of the fog ahead and heading directly for us.

Rec., pp. 35, 36.

That this testimony was given understandingly is indicated by his testimony on cross-examination (Rec., p. 50):

A. Why, I was awake when I first heard three whistles on one of these automatic hand horns.

Q. You could tell it was with a hand horn?

A. Oh, yes.

Q. Then what did you do?

A. The mate returned his horn immediately. I had been talking to him a few minutes before. He said it was a sailing vessel blowing three whistles on our starboard bow, and I suggested that it might be the barge we were towing starting to blow three whistles, a long and two short whistles, on the hand horn is rather hard to regulate and one is apt to get one longer than the other. The first whistle we heard sounded like it might be a long with the two a trifle shorter.

Q. Well, what did you do?

A. Why, the mate immediately blew a towing whistle again, and the fellow on the vessel answered almost immediately with three more whistles, and they were very close. I immediately got up and the mate, he stopped the tug and backed.

The mate testified, with respect of the schooner's horn, as follows:

Q. Where did it appear?

A. A little forward of the beam.

Q. Where?

A. On our starboard bow.

Q. And a little forward of the beam?

A. Yes, sir.



Q. Now, could you see at that time the vessel, when you first heard it?

A. No, sir.

Q. When you first heard this fog-horn from the schooner what did you do?

A. I stopped and blowed my whistle and told Captain Lovejoy.

Q. What did you stop?

A. I stopped the engines.

From this condition of the record it is apparent that the testimony of the captain is to be preferred for the reason that while one may forget an incident of an occurrence, one may not remember an incident which did not happen. The captain could not remember the colloquy between himself and the mate unless it had occurred, but it might have occurred and the mate not recall it. We therefore feel justified in taking it for a fact established by the testimony of the libelant that the engines of the tug were not stopped upon hearing apparently forward of her beam the fog signal of the schooner whose position was not ascertained, but that they were stopped only upon the second signal.

Article 16 of the International Rules (26 Stat. L. 326) provides as follows:

“ \* \* \* A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.”

The rule has been construed by the courts in a number of cases. Probably the one most directly in point is that of the “Beaver,” 197 Fed. 866, and which was recently affirmed by this court (219 Fed. 134). In that case the steamer “Selja” first heard the fog whistle of the “Beaver” at three o’clock. She continued on her course for five minutes at a speed of six knots, and at 3:05 reduced speed to slow and at 3:10, while making three and a half or four knots, her engine was stopped. At 3:13 the “Beaver” came out of the fog traveling at a speed of about 14 knots and the collision occurred at 3:16. The fault of the “Beaver” was admitted, but it was contended that the “Selja” also was at fault in that she failed to stop her engines when she first heard the fog signals of the “Beaver.” This contention was sustained by Judge Bean and in the course of his opinion the court said:

“The respondent claims that rule 16 should be so interpreted that the requirement to stop the engine is not obligatory if the position of the approaching vessel is ascertained ‘with reference to danger of collision by an approximate of accuracy’;

but this would leave the law substantially the same as it was prior to the adoption of the rule, and would not accomplish the purpose intended by its enactment. It was designed to take away from a vessel the right to proceed at all, after hearing the first signal, without first stopping the engines to enable those in charge to ascertain the position of the signaling vessel. It recognizes the difficulty of ascertaining from the sound of a whistle the exact position, and especially the course and distance of a vessel in a fog. It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such a zone except after stopping its engines to ascertain the position of the oncoming ship."

On appeal, this court (219 Fed. 134) calls attention to the fact that the officer in charge of the "Selja" testified that the first whistle of the "Beaver" sounded faint, but distinct, and sounded far off, and that at first he thought it might be one of the fog horns off Golden Gate. When asked why he did not stop the engines when he heard the first whistle of the "Beaver" his answer was: "Well, because the sound was located as good as could be located in a fog, and showed absolutely no danger of a collision." The opinion continues:

"But the uncontradicted evidence shows that the Selja's engines were certainly not stopped prior to

3:10—at least 10 minutes after her master had heard the first whistle of the approaching vessel. No amount of argument, no matter how ingenious and clever, can justify a court in ignoring the plain provisions of statute law. Article 16 of the act of Congress entitled ‘An act to adopt regulations for preventing collisions at sea’ provides, among other things, that:

“‘A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.’

26 Stat. L. 326.

“That the captain of the Selja did not know the position of the Beaver until she came in sight, only one minute before the collision, is perfectly manifest from his testimony.”

The court further said:

“The further contention on the part of the appellant that even if the Selja was in fault in the particulars indicated, such fault was not a contributing cause to the collision, cannot be sustained. As pointed out by the trial court, the law is that, where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.” (Citing cases.)

This court has so recently in the case referred to stated the rule under discussion and the consequence of its violation, that it is not necessary to



quote from any other authority. We, however, refer to the case of the "St. Louis," 98 Fed. 750, and the "Pennsylvania," 19 Wall. 125, as supporting our theory of the case.

From the testimony of Captain Lovejoy of the tug it is apparent that the first signal was heard about a minute and a half before the collision. If the engines of the tug had been stopped at that time and then reversed instead of having been stopped and reversed approximately a minute later, there can be no question but that the collision would have been avoided. At any rate, since the tug violated its statutory duty it is bound to show that that violation could not have contributed to bring about the collision or it must be held to be in fault.

#### IV.

*The tug was negligent on starting back in failing to signal that manoeuver for the information of those in charge of the schooner.*

#### V.

*The tug was at fault in that when the engines were stopped they were reversed for a time and then started ahead at full speed.*

These two points may be discussed together.

The tug was 107 feet long between perpendiculars. (Rec., p. 40.) In the collision she was struck just abaft the house about 20 feet forward of the stern. (Rec., p. 86.) If she had been struck 12 feet farther back the schooner would have penetrated her water tank and the tug would not have sunk. (Rec., pp. 43-44.)

The mate of the tug, who was in charge when the collision became imminent, testified as follows (Rec., pp. 95-96):

Q. Now, when you saw the schooner first, she was about 200 feet away?

A. About that, yes.

Q. And your idea was by stopping your engine and then reversing the engine, was to avoid her?

A. Yes, sir.

Q. If it had been continually reversed, would it have avoided her?

A. No.

Q. Why not?

A. Because he did not change his course. We could not stop the way of the vessel at the time she would be reached.

Q. Were these proceedings on your part to stop the engines and reverse the engines on the assumption that the captain of the schooner would change the course of his vessel?

A. Certainly.

Q. Based on that?

A. At that time.

Q. If you had known that he was not going to change his course, what would you have done?

A. I certainly would have rung full speed and probably would have cut the hawser to give her a chance to get away.

Captain Scott of the schooner testified (Rec., pp. 145-146:

Q. Did he give any signals indicating that he had reversed his engines?

A. No.

Q. What would be the signal if he had reversed his engines?

A. Three short blasts of the whistle.

Q. If they had given any such signal what would you have done?

A. I would have endeavored to keep ahead of the towboat, and I would have endeavored to put my helm hard aport and tried to come around this way and get ahead of her. I would have known then that she was going astern.

Q. As far as you could judge, as far as you knew, she was coming on ahead?

A. I did not know what he was doing.

No witness pretends this signal was given.

He further testified (Rec., 146-147):

Q. Assuming that she had reversed her engines and then after coming almost to a stop, had signaled full speed ahead, would that action on the part of the steamer have anything to do with causing the collision?

A. Well, evidently it had something to do without his keeping a straight course and according to their testimony that is exactly what they did. Now, had they kept on and not reversed their engines, there would have been no collision.

Q. State why?

A. Because this reversing their engines for a certain length of time, we don't know how long, but it tended to stop the vessel, possibly she was going



astern, I don't know, but had they kept on at full speed ahead, they would have covered two or three or four ship lengths, and she would have cleared us nicely. Suppose they had been stopped, the way through the water had been stopped at the time they saw me, and with the engines going full speed astern, I was clearing them by at least half a ship length. Say this was their vessel and this was me here (showing), I was clearing them by a half a ship length had they kept their vessel going full speed astern, I ought to have cleared them that way.

Q. You would have cleared them if they had kept their vessel going full speed astern?

A. I would have gone ahead.

Q. If they kept their vessel going full speed ahead how would you have cleared them?

A. I would have gone astern.

Q. Across their tow-line?

A. Across their tow-line.

This conclusion is supported by the testimony of the mate of the tug (Rec., p. 82) that when he first saw the schooner (about 200 feet away) (Rec., p. 88). she appeared to be heading about amidships of the tug, and like testimony of the captain of the tug. (Rec., pp. 51, 53.) If the schooner was traveling,

as claimed by libelant, from 7 to 8 knots per hour, and the tug from 4 to 5 miles, and the tug had not been reversed, it would have traveled over 100 feet while the schooner was traveling 200, which would have been enough. The tug was backing 10 or 12 seconds, reducing the speed to about one mile per hour (Rec., p. 51), and yet the tug almost escaped.

The evidence of the captain of the schooner contains also this statement:

Q. Well, when you saw this tow-boat, what did you do then?

A. I did nothing but keep on as I was going.

Q. Why?

A. Because there was nothing to do. I did not know what he was doing. According to the rules of the road I had to keep on.

(Rec., p. 145.)

Let us now consider for a moment the status of the tug and the schooner. It was the duty of the tug to keep out of the way of the sailing vessel. The tug could be stopped and backed and started forward or manoeuvred in any direction, while the mobility of the schooner was limited. The tug was endeavoring to manoeuver so as to avoid the collision. The schooner could not co-operate with it

without knowing what was intended. It had to keep on. If the tug had not reversed its engines but after stopping them had gone ahead full speed, it would have escaped. In the absence of a signal that the engines were reversed, those in charge of the schooner had the right to assume that the tug would go ahead. On the other hand, the mate of the tug believed that if it were backed and the schooner's wheel were put hard aport the danger would be averted and the testimony of the captain of the schooner sustains that theory. Yet, when the engines of the tug were reversed no signal was given to the schooner, so that it could not co-operate with the tug to avoid the accident. It is perfectly apparent that the causes of the collision were the backing and starting of the tug and the failure of the tug to signal its movements.

In the opinion of the lower court the actions of the tug are excused as being taken *in extremis*, while the failure of the schooner to port its helm is condemned. But was the peril of the schooner less imminent than that of the tug? Are its actions to be condemned as if there were ample time to govern them, while the blunders of the tug are to be excused though done with equal time for deliberation? The schooner could not do otherwise than it did do because of lack of information as to what would be done by the tug. For that lack of information those

in charge of the tug were responsible, since they violated their legal duty to warn the schooner of any departure from its regular course. The tug needed to go but 12 feet farther to have avoided serious injury, or 20 feet farther to have escaped the contact. If it had not reversed its engines it would easily have made this distance. If it had backed and the schooner's helm had been put hard aport it is probable that no accident would have occurred. This action was prevented by the tug's own negligence. Upon it, therefore, must rest the responsibility for the collision and for the damage which appellee sustained.

Respectfully submitted,

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No. 2599

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

COAST SHIPPING COMPANY, a corporation,  
Claimant of the Schooner "Oceania Vance,"  
her Tackle, Apparel and Furniture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a corporation,

Appellee.

Upon Appeal from the District Court of the United  
States for the Western District of Wash-  
ington, Northern Division.

**BRIEF FOR APPELLEE**

HUGHES, McMICKEN, DOVELL & RAMSEY,  
OTTO B. RUPP,

Proctors for Appellee.

**Filed**  
COWMAN & HANFORD CO., SEATTLE

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**F. D. Monckton,**



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**BRIEF FOR APPELLEE**

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**STATEMENT.**

About 12:30 on the morning of June 9, 1909, the tug "Sea Lion," having in tow the barge "Charger," laden with rock, sailed from Cowlitz Bay on Waldron Island bound for Grays Harbor. The "Sea Lion" was of the length of 107 feet, beam 22 feet, depth of hold 13 feet. She was owned by

the Puget Sound Tug-Boat Company, and, with the fuel aboard and her equipment, was worth from \$30,000 to \$35,000. Just before starting she had taken on a full cargo of coal at Ladysmith, which, together with her water supply, made her deep in the water. She carried a full complement of officers and crew and was in all respects well equipped and appareled.

The barge had a carrying capacity of 1700 tons and was attached to the tug by a hawser approximately 1200 feet in length.

Captain Lovejoy, the master of the tug, was on watch when the "Sea Lion" left Cowlitz Bay and so remained until the tug arrived off Turn Point on Stuart Island, when he went to bed. At that time there was no fog, but off Discovery Island a fog came in and quickly grew thick, and so stayed until some hours after the collision. Thereupon the mate started to blow the whistle, a deep, coarse whistle, one long and two short, the prescribed signal for a vessel having a tow. This whistle was continuously sounded until the time of the collision, and no contention is made by appellant that such is not the proper signal nor that it was improperly given, both Captain Scott and First Officer Williams of the "Oceania Vance" saying that they heard it for ten or fifteen minutes before the collision.

After passing Discovery Island the "Sea Lion" shaped her course to pass Race Rocks, a collection of rocky islets just off the most southerly point of



Vancouver Island. The course of the "Sea Lion" was about southwest three quarters south, that being the usual course of steam vessels outward bound, which course, if the collision had not taken place, would have been maintained until she reached the place marked "A" on libelant's (appellee's) Exhibit "A," when the course would have been changed to pass outward to Flattery.

Just before 6:40 A. M. the men on board the tug heard the automatic hand horn of the "Oceania Vance." The "Oceania Vance" was then giving three blasts, indicating that she was a sailing vessel running before the wind. Captain Stream, the mate of the "Sea Lion," and then in charge, immediately gave the signal to stop the engines of the tug and at the same time blew his tow signal, such action being that required by statute. Thereupon the schooner blew three blasts of her whistle in response, but before the third blast was completely blown she loomed out of the fog, though those on board the tug were unable at that time to see the whole length of the ship or her exact course, but were able to ascertain that she was heading toward amidships of the "Sea Lion." The schooner was then distant about 175 or 200 feet.

On seeing the schooner, Captain Stream gave the signal to reverse the engines. By this time Capt. Lovejoy had reached the wheelhouse, his bunk being on a level with the wheelhouse and connected therewith by a door, Capt. Stream going aft to endeavor to prevent the hawser from fouling the propeller.

When Lovejoy reached the wheelhouse the tug had not entirely lost her headway, and, owing to the fact that the "Sea Lion" when backed had a habit of swinging around to port very abruptly, thus bringing her right in line with the way the schooner was coming and making a collision inevitable, Lovejoy, in an endeavor to avert the same, ordered full speed ahead, that being the only chance he then had. At the same time Lovejoy called to the lookout on the "Oceania Vance" to put the wheel of the schooner over, but no attempt to comply with this request was made by those in charge of the schooner.

A few seconds later the bow of the "Oceania Vance" struck the "Sea Lion" about twenty feet forward of the latter's stern, cutting a hole variously estimated from a foot and a half to three feet in width, while the headgear raked the aft end of the tug's house, taking out the mast, bell pulls, davits and boats.

The captain of the "Oceania Vance," being better able to ascertain the danger than those on board the tug, told the crew of the tug to hurry up and get off. The crew and officers of the "Sea Lion" accordingly climbed up the bobstays, just having time to get aboard the "Oceania Vance" when the schooner broke out and the "Sea Lion" sank in 72 fathoms. After speaking the barge, the "Oceania Vance" squared away for Port Townsend.

The foregoing statement does not include any controverted question of fact except that as to when the engines of the tug were stopped.

## ARGUMENT.

## I.

*The Speed of the "Oceania Vance" Was Excessive.*

The chief, if not the only question for solution in this case, is the speed at which the schooner was proceeding prior to and at the time of the collision.

(a) The trial judge found that "the schooner was going not less than six and one-half or seven knots an hour" (Rec. p. 162); and this finding is fully warranted by the testimony.

Capt. Lovejoy testified that at the time of the collision the wind was blowing fifteen or twenty miles an hour (Rec. pp. 35, 39) from the southwest (Rec. p. 97), that being a fair wind for a schooner inward bound.

Anderson, the quartermaster of the "Sea Lion," who had been a seaman for forty-one years, fourteen years of which period he had been master of sailing vessels (Rec. p. 104), characterized it as a "strong breeze" (Rec. pp. 100, 104, 109), so strong that it would have required two men to have pulled a boat against it (Rec. p. 110).

Williams, the first mate of the schooner, admitted that a fresh wind was blowing at the time of the collision (Rec. p. 127); while the master of the "Oceania Vance" admits that in order to take advantage of this fair, fresh breeze, the schooner at the time of the collision had up her courses, fore-sails, jib and spanker topsails (Rec. pp. 156, 157), all the sail, no doubt, she was capable of carrying in

such a breeze. Capt. Lovejoy says that all sails set were full and drawing (Rec. p. 37).

It is also indisputable, we think, that the schooner in order to make speed had been tacking back and forth from the time she passed in from Flattery, the evening before, down to the time of the collision. Capt. Lovejoy testified that both the captain and the mate of the schooner told him that such was the fact (Rec. pp. 42, 47), while Capt. Scott admitted he had changed his course, not only after passing Race Rocks, but also prior thereto; but how many times, he said he could not remember (Rec. p. 151).

Irrespective of whether the schooner had been tacking back and forth, it is clear that, under the prevailing conditions of wind and weather and taking into consideration that the schooner was light (Rec. p. 157), that she "always ran before the wind" (Rec. p. 151) and that she had all her lower and some of her topsails set, she was able to make seven or eight knots if those in charge of her were so inclined. Furthermore, the testimony abundantly shows both that such was the inclination of those in charge of her and that such was her speed.

Capt. Lovejoy states that some fifteen or twenty minutes after the schooner had shaped her course for Dungeness he took the log for the first half hour, and at that time she ran about three and one-half or seven knots an hour (Rec. pp. 41, 47, 54). His testimony is corroborated by that of Smith (Rec. pp. 63, 67). At this time the wind had moderated somewhat and was gradually dying out (Rec.



pp. 41, 51, 69). In fact, before Dungeness was reached the wind had abated so much that the schooner was not able to make a mile an hour (Rec. p. 41).

Now if the schooner after the collision, when the fog still prevailed, was sailed at a speed of seven knots an hour, is it not reasonable to believe that such was her speed shortly prior to the collision? If those in charge of the schooner were willing, after a catastrophe had occurred, to violate the statute which provides that "every vessel shall in a fog \* \* \* go at a moderate speed," there ought to be a presumption that they were at least equally willing to violate the statute *before* they had run down and sunk another ship.

Captain Scott himself, five days after the collision, gave the following testimony before the United States inspectors:

"Q. How do you conclude that you were only running five miles an hour?

A. By the distance between Cape Flattery and Race Rocks and the number of hours it took to run it.

Q. You were a witness before the Inspectors, were you not, after this collision?

A. I was.

Q. On or about June 14th, 1909. At that time you gave this testimony:

'Q. About what speed were you going?

A. I should judge by *figuring* from my log, the vessel was going between six and a half and seven knots.' Was that correct?

A. At that time I had not *figured* up my distance.

Q. You say here 'By *figuring* from my log the vessel was going between six and a half and seven knots.' You had the log at the time and evidently figured from it?

A. As I say, at that time I had not *figured* my distance. I did not have the *time* to *figure* the distance. I was too busy. I jumped up to the Inspectors and took the examination, or was there for the examination.

Q. The collision occurred on the *9th* and your examination did not take place until the *14th*, after the 14th day of June, five days elapsed; do you mean to say that you did not have access to your log during the five days, to consider any of these matters?

A. I had access to my log at all times.

Q. Did you bring your log with you to the Inspectors' office?

A. The log was with me at the Inspectors' office.

Q. Right there with you in the Inspectors' office?

A. Yes sir.

Q. And when you answered this question, you figured from your log, didn't you?

A. I did not figure from anything. That was my own opinion at the time.

Q. You gave this answer to the question propounded:

'Q. About what speed were you making?' and you answered:

'A. I should judge by figuring from my log, the vessel was going between six and a half and seven knots.'

You gave that answer to that question?

A. I did, I gave that answer to the question."

(Rec. pp. 152 *et seq.*)

Appellant now seeks to meet this testimony by arguing that inasmuch as the distance from Flat-tory to the point of collision was fifty miles and that inasmuch as Scott testified that the schooner passed

Flattery at eight o'clock, the schooner could not be going at the time of the collision at a speed to exceed five knots an hour.

In the first place, it may be said that Capt. Scott himself, at the hearing before the United States Inspectors, admitted that he passed Flattery at nine o'clock.

"Q. You were also asked this question: 'When did you pass the Cape?' and you answered 'Nine o'clock Wednesday night.' Is that correct?

A. I do not remember what I answered.

Q. Well, I ask you to look at this transcript of your testimony, and tell me whether or not that question was propounded to you and you gave that answer?

A. Which part of it?

Q. I just read you that question there, and then this question here 'What time did you pass the Cape?' and your answer 'Nine o'clock.' You gave that testimony did you not?

A. I was always of the impression that it was eight o'clock.

Q. You gave that testimony?

A. I do not remember whether I did. I do not remember whether I gave it.

Q. I show you a copy of the testimony taken at that time and ask you if you are now disposed to dispute its correctness?

A. No, I am not disposed to dispute it, if that is a straight copy of what I said up there, it must be."

(Rec. pp. 153, 154.)

Moreover, an examination of libelant's Exhibit "A" will demonstrate that it is almost exactly fifty miles from Flattery to the point of collision *in a straight line*; but certainly no sailing vessel could sail a course so straight. And in addition thereto,

we have the testimony of Scott himself that the vessel's course had been changed several times during the night.

As a matter of fact, the location in which the "Oceania Vance" was at the time of the collision will demonstrate beyond question that the "Oceania Vance" did not sail straight up the Sound.

Furthermore, this theory is based upon the supposition that the wind blew with the same velocity throughout the night, an assumption which the testimony does not disclose to be the fact.

On the same theory it might be argued that the speed of the schooner at any particular time on the course from the point of collision to Port Townsend was between four and five knots per hour. In fact, Capt. Scott based his testimony, at the time of trial, that the "Oceania Vance" was making five knots an hour at the time of the *collision*, partly on the time "it took her to run from *Race Rocks to Port Townsend* (Rec. p. 142)." Yet Williams, the mate of the "Oceania Vance," admitted that while traversing a portion of that course they were at times not making a mile an hour. It is a matter of mathematical demonstration, however, that in order to make forty miles in nine hours, they must have made more than five knots an hour at some periods, if during other periods they were making only one mile an hour.

Now not only was the schooner going at an immoderate speed through a dense fog, but she was also in a place where ships pass frequently, and it



was therefore her duty, irrespective of statute, to navigate with care and caution.

*The Rhode Island*, 17 Fed. 554, 558.

(b) Despite the elaborate argument made by appellant to show that the speed of the "Oceania Vance" did not exceed five knots an hour, it further contends that seven knots an hour was not excessive speed. The proximity of land and the existence of currents are assigned as reasons which *might* justify a speed of seven to eight knots.

This contention merits but little consideration. No witness testifies that it was necessary to go seven knots an hour in order to maintain steerage-way; the officers of the schooner make no such claim.

The case of *The Chattahoochee*, 173 U. S. 540, reviews all the cases and it will be found by an examination of these cases that a speed of seven knots an hour in a dense fog has never been held justifiable.

It is true that in *The Eagle Point*, 114 Fed. 971 (cited by appellant on page 17 of its brief), the district judge held that seven knots was not excessive speed for a steamer proceeding in a dense fog. On appeal, however, the decision of the lower court was reversed, the Court of Appeals basing its conclusion in part on the following quotation from *The Pennsylvania*, 19 Wall. 125:

"And we do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true, her master, while admitting she was going seven knots, states that he don't con-

sider she could have been steered going slower,—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to.”

*The Eagle Point*, 120 Fed. 449, 453.

## II.

*The Schooner Was Negligent in Failing to Put Her Helm Hard Aport Prior to the Collision.*

Capt. Roos testified that putting the helm hard aport would have brought the schooner up into the wind and have stopped her headway and though there might have been a collision, the force of it would have been greatly diminished (Rec. p. 114). He points out also that whether the tug was backing or going ahead with her wheel hard astarboard, the result would be the same (Rec. p. 113). The testimony of Stream is practically the same (Rec. p. 87). Furthermore, the answer of the appellant admits that good seamanship required such action, for it alleges that “immediately” after the tug came in sight “the schooner endeavored to steer so as to get out of the way of the ‘Sea Lion’”—and “that when the said ‘Oceania Vance’ and its officers heard the whistle of the said tug ‘Sea Lion’ they did their

utmost to steer clear of anything coming near it and *had swung quite a little bit*, when the said 'Sea Lion' crashed into the said 'Oceania Vance'." (Rec. p. 26.) The record, however, is barren of any evidence tending to establish either of these allegations. Moreover, Scott himself admitted our contention when he said that if he had known the tug was going astern, he would have endeavored to put his helm hard aport and tried to get ahead of her (Rec. p. 146).

Appellant, however, seeks to avoid this fault by claiming that inasmuch as the tug did not blow three blasts of her whistle, the officers of the schooner did not know the "Sea Lion" was backing, and in the absence of such knowledge were not required to take the course suggested. As to this contention, we say, first, that in view of the testimony of Captains Roos, Stream and Lovejoy, it was the duty of the "Oceania Vance" to put her helm hard aport irrespective of whether the tug was going ahead with the wheel hard astarboard or was backing. In the second place, we think that the claim is clearly an afterthought. The answer does not assign the failure to give such a signal as a fault, while Scott, five days after the collision at the hearing before United States Inspectors, testified as follows:

"Q. At the time of the breaking through the fog up to the time of the collision, do you think there was time enough for either vessel to have been manoeuvred so as to clear?

A. I do not think anything in the world would have averted the collision."

From this testimony it is apparent that Scott would have kept straight on, even if the tug had notified him that her engines had been reversed. That this last statement is correct is evident from the following testimony of Williams, the mate of the schooner:

"Q. Was there anything that those in charge of the schooner could have done after you sighted the tug to avert the disaster?

A. Nothing whatever, we were too close to each other, *even if we had put the wheel the other way* she could not have answered in time.

Q. You were bound to come in contact?

A. We were bound to come in contact." (Rec. p. 132.)

Furthermore, the evidence is undisputed that Capt. Lovejoy requested the lookout on the schooner to put her wheel hard aport. Lovejoy says that he "motioned for him and *hollered* to him to put the wheel over." Appellant now tries to meet this testimony by saying that the evidence does not show that the signal of Lovejoy was *seen*, or, if seen, that it was understood. The significant thing, however, is that no witness on behalf of appellant denies that the motion was seen *or the call heard*.

On the whole, then, it clearly appears that proper seamanship required the schooner to take the action requested; that she did not do so; that her failure to do so was not attributable to the fact that the tug omitted to blow her whistle, but solely to the be-



lief of the schooner's officers that nothing could be done to avert the collision.

In view of all the testimony, therefore, the schooner violated Article 21 of the International Rules, which, as amended, reads as follows:

“Article 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.) [28 Stat. L. 83.]”

It may be true that changing the course of the “Oceania Vance” would not have entirely averted the collision; but it would at least have lightened the blow. In all likelihood the vessels would simply have bumped together and the damage, if any, would have been slight.

### III.

#### *The Tug's Engines Were Stopped Upon Hearing the First Signal of the Schooner.*

It is claimed, however, that the tug's engines were not stopped as soon as those in charge of her heard the first signal of the schooner. This claim is based upon the following testimony of Captain Lovejoy:

“Q. When you first heard the signal of the ‘Oceania Vance’ what did you do?

A. Why, the mate spoke to me. He said there was a sailing vessel. The ‘Oceania Vance’ blew three whistles on a hand horn, and three whistles

indicate that the vessel has the wind abaft the beam, and also three whistles, a long and two short whistles, is a signal allowed by a barge or sailing vessel being towed by a tug, they can make that to show us that they are being towed. I heard the whistle so plainly, and the mate said there was a vessel ahead on the starboard bow, and I said, 'Are you sure it is not the barge starting to blow?' and he said, 'No, I am quite certain it is ahead; it sounded quite loud,' and he answered the whistle right away, and almost immediately she blew another whistle, and then I was satisfied she was right ahead on the starboard bow, *and I got into the pilot-house and the mate stopped her and started to back;* and when I got into the pilot-house the bow of the vessel was coming out of the fog ahead and heading directly for us" (Record, pp. 35, 36.)

Now, in the first place, it will be observed that Capt. Lovejoy was not attempting to narrate events in the strict order in which they happened. While he says that "I got into the pilot-house and the mate stopped her and started to back," yet it is clear from other testimony of Capt. Lovejoy, corroborated by that of the mate, that the mate had stopped the boat and that the engines were reversed before Lovejoy reached the pilot-house. He says: "Well, when I got in the pilot-house and he said she was backing I looked over the side and she still had her headway on her going through the water, although the engines were reversed" (Rec. p. 37). The mate himself stated:

"Q. When you first heard this fog horn from the schooner what did you do?

A. I stopped and blowed my whistle and *told Captain Lovejoy.*" (Rec. p. 81.)

Now what did Stream tell Lovejoy? Precisely what Lovejoy stated, namely, "There is a sailing vessel ahead on the starboard bow." Lovejoy was doubtful if such was the fact, for the reasons given by him, and therefore he replied, "Are you sure it is not the barge starting to blow?" Stream, however, having no doubt about the latter, answered, "No, I am quite certain it is ahead; it sounded quite loud." Now if the mate was so certain that it was a sailing vessel, is it not reasonable to believe that he did stop as soon as he heard the first signal? He ought to know just when the order to stop was given.

Moreover, the mate's testimony is corroborated by Chief Engineer Smith. Smith testified that just before the collision he was asleep; that he was awakened by hearing the stop bell in the engine room (Rec. p. 64); that as he got up he heard the regular tow whistle (Rec. p. 60). Now Stream says that he stopped and blew his whistle. The stop bell must have rung, therefore, immediately before the tow whistle was given. But if the construction which appellant puts on Lovejoy's testimony is correct, the stop bell would have been given some seconds—at least long enough for the conversation above detailed to have taken place—*after* Smith got up and not before.

## IV AND V.

*The Tug Was Not Negligent in Failing to Give a Signal that She Was Going Astern nor in First Reversing Her Engine and then Going Ahead.*

It is contended that the tug was negligent in failing to give a signal that she was going astern and in first reversing her engines and then going ahead. We think we have shown that the fact that the tug did not blow three blasts of her whistle had nothing to do with the neglect of the schooner to put over her wheel. In addition to that, the testimony discloses that it would have been impracticable for the tug to have given such signal.

Stream testified that when he first saw the schooner he backed the tug and at the same time blew the danger signal.

“Q. Did you give the danger signal before you gave the signal to the engine room to back?

A. No sir, they were all done together. I had the left hand on the whistle cord and the right hand on the bell.” (Rec. p. 83.)

While Stream was giving these signals Lovejoy came into the pilot house (Rec. p. 83) and immediately ordered full speed ahead (Rec. pp. 37, 94). Stream, therefore, did not have time to give any such signal, and Lovejoy had no reason so to do.

Neither was there any negligence in first backing the tug and then going ahead. When Stream first saw the schooner he could not make out her course



except that she was apparently heading about amidships of the tug (Rec. p. 82). Believing that the schooner would swing up into the wind and that by backing the tug only a glancing blow would be struck, he gave the order to reverse (Rec. p. 87). The schooner, however, not changing her course, and Lovejoy, knowing that the tug when backed had a habit of swinging around to port very abruptly and that if the backing was continued the hawser might become entangled in the wheel, thus rendering the tug helpless, "decided that full speed ahead was the best course for all concerned" (Rec. p. 55).

Now whether this action was wise or not is immaterial. It was clearly an act *in extremis*, and was therefore not imputable as a fault.

*The Ship Blue Jacket v. Tacoma Mill Co.*,  
144 U. S. 371.

*The Ludvig Holberg*, 157 U. S. 60, 70.

*The F. W. Wheeler*, 78 Fed. 824, 832.

*The E. A. Packer*, 49 Fed. 92, 98.

*The Ella B.*, 19 Fed. 792.

*The Osceola*, 33 Fed. 719.

Moreover, it ill becomes appellant to claim that the tug was at fault in endeavoring to avert the collision, when the officers of the schooner did not endeavor to prevent or mitigate the disaster. One thing at least is certain: If the "Oceania Vance" had not been proceeding at an immoderate rate of speed, no collision would have occurred. And we

submit, therefore, that she alone was at fault, and the judgment should be affirmed.

Respectfully submitted,

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OTTO B. RUPP,

*Proctors for Appellee.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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RUDOLPH SCHULTZ,

Plaintiff in Error,

vs.

STACK-GIBBS LUMBER COMPANY, a Corpora-  
tion,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District  
Court of the District of Idaho,  
Northern Division.

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Filed

SEP 2 1913

P. D. Monckinn;





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the First Judicial District  
of the State of Idaho, in and for Shoshone  
County.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Complaint.**

Comes now Rudolph Schultz, the plaintiff above named, and for complaint against the Stack-Gibbs Lumber Company, the defendant above named, he complains and alleges as follows:

1.

That at all the times hereinafter mentioned the plaintiff was and still is a resident of the County of Shoshone, in the State of Idaho.

2.

That at all the times hereinafter mentioned the defendant was and still is a corporation organized and created under and by virtue of the laws of the

State of Michigan, with authority to do business in the State of Idaho, and having an office for the transaction of business in said State of Idaho, at Coeur d'Alene, in the County of Kootenai.

## 3.

That on or about October 15, A. D. 1912, the defendant was the owner of the southwest quarter (SW.  $\frac{1}{4}$ ) and west half (W.  $\frac{1}{2}$ ) of southeast quarter (SE.  $\frac{1}{4}$ ) of Section Twenty-four (24), the northeast quarter (NE.  $\frac{1}{4}$ ) and north half (N.  $\frac{1}{2}$ ) of *southeast* (SE.  $\frac{1}{4}$ ) of Section Twenty-five (25) and the northeast quarter (NE.  $\frac{1}{4}$ ) of Section Twenty-six (26), all in Twp. 48 North, Range One, East Boise Meridian, in the County of [1\*] Shoshone, State of Idaho, which said lands had growing thereon large quantities of timber consisting of merchantable white pine and yellow pine and large quantity of mixed timber of other varieties; that at said last-mentioned date, and ever since that time, the defendant was and has been engaged in operating a sawmill for the purpose of manufacturing logs into lumber and wood products and its purchase and ownership of the lands and timber above described were for the purpose of converting the said timber, growing upon the said lands, into lumber and wood products, letting the cutting, removal and transportation of said timber to other persons engaged in and familiar with the logging business; that the plaintiff was, on that date and for a long time previous thereto, had been en-

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\*Page-number appearing at foot of page of certified Transcript of Record.

gaged in logging timber and was experienced and skilled in such business and all of the steps necessary in cutting, felling, skidding and transporting timber and logs; and that on or about the said October 15, A. D. 1912, the plaintiff and defendant entered into a contract, the consideration of which was the mutual premises of the parties to the same, whereby the defendant contracted with the plaintiff for the cutting and removal of all of the merchantable white pine and yellow pine timber, standing, growing and being upon the said above-described lands, the plaintiff to enter upon the said above-described lands, for the purpose of securing and transporting said timber and the defendant agreeing to pay to plaintiff certain sums, at various stages of the work, for the logging of said lands, a copy of which contract is hereto annexed, marked exhibit "A" and made a part hereof and to which reference is now made for greater certainty.

## 4.

That upon the execution and mutual delivery of the said contract the same being made in duplicate, the plaintiff entered upon the performance of his part of the same and employed a large number of men, secured by purchase and lease, the right of way for the necessary roads and skidway at a cash outlay of more than eleven hundred dollars, [2] purchased and furnished teams and invested a large amount of money, to wit, more than seven hundred dollars in camp equipage, tools and supplies and ex-

pended the sum of two hundred fifty-five dollars for labor, and by December 15, 1912, he, the plaintiff, felled, cut and placed upon skids and skidways two hundred fifty thousand feet of white pine and yellow pine and in addition thereto felled one hundred thousand feet of similar timber preparatory to placing the same upon skids and in every respect complied with the conditions of the said contract upon his part.

## 5.

That under the terms of the said contract it was provided that on the 15th day of each month for all white pine and yellow pine logs which the plaintiff shall have placed or caused to be placed on skids for transportation that the defendant was to pay him, the plaintiff, the sum of three and 25/100 dollars for each one thousand feet of logs, board measure, placed upon said skids and that the plaintiff in accordance with said contract, had felled, cut and placed upon said skids two hundred fifty thousand feet of white pine and yellow pine as aforesaid, and that, then and there, it became and was the duty of the defendant to pay the plaintiff the sum of three and 25/100 dollars per thousand feet, the said logs having been scaled as required by said contract, the same amounting in aggregate to the sum of eight hundred twelve and 50/100 dollars.

## 6.

That at the time of the making of the said contract with the defendant, Exhibit "A," the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he



informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone, which he could and would incumber for as [3] large amount as he could by his best endeavors obtain and that these two items constituted his entire and obtainable assets, all of which he informed the defendant and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition; that among other things the said contract provided and required that the plaintiff should furnish all right of way over which to haul the logs to be cut from the said lands at his own expense; that on or about the said November 15, A. D. 1912, the plaintiff had expended for right of way for said road the sum of two hundred dollars and more than eleven hundred dollars for building and constructing such road and to fit the same for the purpose of hauling the logs to water and in addition he had expended for supplies and rent of building more than seven hundred dollars; that he had mortgaged his said homestead for as large amount as he was able to obtain and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources; that on said last-mentioned date, the same being due him under said contract, the plaintiff requested the defendant to pay him the sum of eight hundred twelve and 50/100 dollars for the logs all ready placed upon the skids as hereinbefore recited, which said sum or any other sum the defendant refused and neglected to pay; that

plaintiff made, at different times, four trips to Coeur d'Alene, where the branch office of defendant was situated, and requested and demanded payment of the said amount so due to him as aforesaid but the said defendant then and there neglected and refused to pay the same, and has never, to this time, paid the said amount or any portion thereof to plaintiff for his said services in carrying out his part of said contract; and that the plaintiff then and there, to wit, at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had; that he had mortgaged his homestead [4] to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same.

## 7.

That because of the refusal of the defendant to pay him, the plaintiff, the amount of money so due to him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his contract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of

the said contract and to abandon the same.

## 8.

That there was growing upon the said lands hereinafore described, the cutting, felling and transporting of which was covered by the said contract three million five hundred thousand (3,500,000) feet of yellow pine and one million five hundred thousand (1,500,000) feet of white pine, all of which would have been cut, felled and transported by plaintiff in accordance with his part of said contract if the defendant had not repudiated its obligations to pay the plaintiff for his work and labor the amount, on the times and in the manner provided by said contract, had the plaintiff not been prevented from carrying out his said contract by the acts of the defendant as hereinbefore mentioned; and that if the plaintiff had by the acts of the defendant required on its part under said contract been permitted to carry out and complete his part of the same he would have had a profit thereon of the sum of one dollar (\$1.00) per thousand feet, board measure, of the [5] aggregate of said timber, to wit, five million (5,000,000) feet; and by reason of the default of the defendant and its repudiation of its said contract the plaintiff had been damaged in the sum of five thousand dollars, which he would have realized as profits upon his said contract; the sum of seven hundred dollars, expended by him for supplies and rent of building; two hundred dollars expended by him for right of way, eleven hundred dollars expended by him in making the said roadway and two hundred fifty-five dollars expended by him for labor, all of which were lost to

him by reason of the said acts of the defendant.

WHEREFORE, the plaintiff prays judgment against the Stack-Gibbs Lumber Company, the defendant, above mentioned, for the sum of seven thousand two hundred fifty-five dollars, for all costs and disbursements in this behalf by him incurred and expended, and for such other and further relief as to the Court shall seem meet and proper.

And the plaintiff above named further complaining of the said defendant for a second cause of action against the said defendant complains and alleges as follows:

1.

He adopts paragraphs one (1), two (2), and three (3) of his First Cause of Action herein set forth, and refers to the same for full certainty and makes the same a part hereof.

2.

That on the said October 15, A. D. 1912, in consideration of the plaintiff having entered into the contract described in his First Cause of Action herein and designated as Exhibit "A," the defendant entered into a contract in writing whereby it, the defendant, agree to sell to the plaintiff, and the plaintiff agreed to purchase from the defendant all timber growing upon the said lands described in paragraph three (3) of his First Cause of Action, other than the merchantable [6] white pine and yellow pine growing, situate and being thereon, to wit, all mixed white fir, red fir, tamarack, spruce, black pine and cedar timber, at and for the price and sum of 50¢ per 1,000 feet, the plaintiff to have 4 years to cut and remove



all of said mixed timber, a copy of which contract is hereto annexed, marked Exhibit "B" and made a part hereof.

## 3.

That the said contract, Exhibit "B," was dependent upon and in its carrying out was to follow the completion of the contract described in his First Cause of Action herein, Exhibit "A," and that by reason of the repudiation and default of the defendant described in paragraphs four (4), five (5), six (6) and seven (7), stated in his First Cause of Action herein, to which reference is now had and the same are made a part hereof, the plaintiff was prevented from carrying out and performing his part of the contract described in Exhibit "A," attached to his complaint, and he was obliged because of said acts of the defendant to abandon the same; that there was growing, standing and situate upon the said described lands the quantity of three million five hundred thousand (3,500,000) feet of mixed timber referred to and made the subject of the contract Exhibit "B," that if the defendant had kept its several obligations entered into with the plaintiff and had not repudiated and been in default in the carrying out of its said contract, the plaintiff in the performance of his part of the said contract Exhibit "B," would have readily had and made a profit of 75¢ per one thousand feet, board measure, of said mixed timber, to wit, an aggregate profit of two thousand six hundred twenty-five dollars, and by reason of the acts, repudiations, and default of the defendant the plaintiff has been damaged in said sum.

WHEREFORE the plaintiff prays judgment upon his said Second Cause of Action for the sum of two thousand six hundred twenty-five dollars and an aggregate judgment for the sum of nine thousand eight hundred [7] eighty dollars, his costs in this behalf incurred and expended, and for such other and further relief as to the Court shall seem meet and proper.

J. H. WIXOM,  
Attorney for Plaintiff. Residence and Postoffice  
Address, Wallace, Idaho.

CHAS. E. MILLER,  
Of Counsel.

State of Idaho,  
County of Shoshone,—ss.

Rudolph Schultz, being first duly sworn, on his said oath, deposes and says: That he is the plaintiff in the within entitled action and that he has read the foregoing complaint; that he knows the contents thereof, and that he believes the same to be true.

RUDOLPH SCHULTZ.

Subscribed and sworn to before me this 7th day of March, A. D. 1914.

HENRY C. BUCHANAN,  
Justice of the Peace in and for Said County. [8]

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**Exhibit "A" [to Complaint.]**

THIS AGREEMENT, Made and entered into this 15th day of October, A. D. 1912, by and between Rudolph Schultz of Kingston, Idaho, the party of the first part, and the Stack-Gibbs Lumber Company, a

corporation organized and existing under and by virtue of the laws of the State of Michigan, authorized to do business in the State of Idaho, the party of the second part.

WITNESSETH, The party of the first part agrees to cut into saw logs, skid, haul, float and drive all of the merchantable white pine and yellow pine timber now situate and lying on the southwest quarter (SW.  $\frac{1}{4}$ ) and west half (W.  $\frac{1}{2}$ ) of southeast quarter (SE.  $\frac{1}{4}$ ) of Section Twenty-four (24), the northeast quarter (NE.  $\frac{1}{4}$ ) and north half (N.  $\frac{1}{2}$ ) of southeast quarter (SE.  $\frac{1}{4}$ ) of Section Twenty-five (25) and the northeast quarter (NE.  $\frac{1}{4}$ ) of Section Twenty-six (26) Township Forty-eight (48) North, Range One, East Boise Meridian, Shoshone County, Idaho, at six and 50/100 dollars (\$6.50) per M. feet, board measure, delivered in the main North Fork of Coeur d'Alene River as hereinafter provided.

That all of said white pine logs be cut down to a diameter of not less than eight (8) inches at the small end and excepting the 18 and 20 foot logs which shall be fifteen (15) inches and up in diameter at the small end and cut from coarse, common timber; that all said yellow pine logs be cut down to a diameter of not less than ten (10) inches at the small end, excepting the 18 and 20 foot logs which shall be fifteen (15) inches and up at the small end and cut from coarse, common timber.

That the lengths of said white pine logs shall be as follows: 15% 12 foot, 15% 14 foot, 60% 16 foot, 5% 18 foot, 5% 20 foot and that the yellow pine logs shall

be cut 10 % 12 foot, 10% 14 foot, 70% 16 foot, 5% 18 foot and 5% 20 foot. It is mutually agreed between the parties hereto that party of the second part may change the percentage of each length to the whole by serving written notice upon party of the first part.  
[9]

That the said logs be scaled with a Scribner Decimal A. Rule by a scaler to be mutually agreed upon by the parties hereto, each to pay one-half of said scalers' wages, the party of the first part to board said scaler at his expense.

That all of said white pine and yellow pine logs be marked on the side with the side mark of the Stack-Gibbs Lumber Company A and that all said white pine and yellow pine logs be marked on both ends with the stamp mark of the Stack-Gibbs Lumber Company 32. That the end mark be placed on each end of each log a sufficient number of times to insure its identification as the property of the party of the second part.

That the party of the first part agrees to furnish all right of way over which to haul the above-mentioned logs.

That the party of the first part shall cut into saw logs, skid, haul, float and drive to the main North Fork of the Coeur d'Alene River not less than one million feet white pine timber on or before the spring drive of 1913 passes Pine Creek, and the balance of said white pine and yellow pine timber to be cut into logs, skidded, hauled, floated and driven to the main North Fork of Coeur d'Alene River on or before the spring drive of 1914 moves or not later than June



1st, 1914, except that should this contract be extended as hereinafter provided.

That the party of the first part shall furnish receipts for all labor performed on the above logs or satisfactory evidence that said labor has been fully paid, also receipts for payment of all supplies used in the logging of the above-mentioned timber, or satisfactory evidence that said supplies have been fully paid; that the said party of the first part shall fully perform their part of this contract and cut into saw logs, skid, haul, float and drive all said white and yellow pine timber and deliver same into the main North Fork of the Coeur d'Alene River on or before June 1st, 1914, except should the work of getting the white and yellow pine logs out by party of the [10] first part be delayed from causes unavoidable that the time be extended by mutual consent of the parties hereto.

In consideration of the stipulations herein to be fully performed by the party of the first part, the party of the second part agrees to pay to said party of the first part on the 15th day of each month Three and 25/100 Dollars per M. foot, board measure, for all said white pine and yellow logs which shall have been placed on skids by the party of the first part during the preceding calendar month, providing, however, that the party of the first part shall have roads made from skidways to be banking ground of Pine Creek so that the said logs can be hauled to the banking on Pine Creek without additional expense, excepting for hauling and Two and 25/100 Dollars per M. Feet, board measure, on the 15th

day of each month for all said white pine and yellow pine logs which shall have been hauled and floated in Pine Creek by the party of the first part during the preceding calendar month and the balance of \$1.00 per M. feet, board measure, on the 15th day of each month, for all said white pine and yellow pine logs delivered in the Main Fork (North) of Coeur d'Alene River during the preceding calendar month.

IN WITNESS WHEREOF the parties hereto have hereunto caused their names to be signed this 15th day of October, A. D. 1912.

(Signed) RUDOLPH SCHULTZ,  
STACK-GIBBS LUMBER COMPANY.

By WM. DOLLAR,  
Treasurer. [11]

State of Idaho,  
County of Kootenai,—ss:

On this 23d day of October, A. D. 1912, before me, H. F. Cleland, a notary public, within and for said county, personally appeared Rudolph Schultz, known to me to be the individual who executed the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal]

H. F. CLELAND,  
Notary Public.

State of Idaho,  
County of Kootenai,—ss.

On this 15th day of October, A. D. 1912, before

me, H. F. Cleland, a notary public within and for said county, personally appeared Wm. Dollar, known to me to be the treasurer of the corporation that executed the within instrument and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal]

H. F. CLELAND,  
Notary Public. [12].

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**Exhibit "B" [to Complaint].**

This agreement made and entered into this 15th day of October, A. D. 1912, by and between Stack-Gibbs Lumber Company, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, duly authorized to transact business in the State of Idaho, the party of the first part, and Rudolph Schultz of Kingston, Idaho, the party of the second part.

WITNESSETH: In consideration of the signing of a contract of even date herewith by the party of the second part, said contract being for the cutting into saw logs of the merchantable white pine and yellow pine timber on the lands described herein, and the skidding, hauling, floating and driving of same to the main North Fork of the Coeur d'Alene River, and fifty cents per M. feet board measure, on the mixed timber covered by this agreement and other valuable considerations;

The party of the first part agrees to sell and the party of the second part agrees to purchase all of the

mixed white fir, red fir, tamarack, spruce, black pine, and cedar timber on the following descriptions: Southwest quarter (SW.  $\frac{1}{4}$ ) and West half (W.  $\frac{1}{2}$ ) of Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Twenty-four (24), Northeast quarter (NE.  $\frac{1}{4}$ ) and North half (N.  $\frac{1}{2}$ ) of Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Twenty-five (25) and Northeast quarter (NE.  $\frac{1}{4}$ ) of Section Twenty-six (26) Township Forty-eight (48) North Range One (1) East Boise Meridian, Shoshone County, State of Idaho.

Party of the second part agrees to cut and remove all of said mixed timber on or before four years from the date hereof and to pile the brush resulting from said cutting as the work progresses and to burn said brush each year, the piling and burning said brush to conform to the State Fire Law as enforced by the Fire Warden appointed by the State.

Party of the second part also agrees to pay said Fifty-cents per [13] M. feet, board measure, on the 10th day of each month for all said mixed timber cut, banked and scaled the preceding calendar month, title to said mixed timber to remain in party of the first part until fully paid for by party of second part.

First party agrees to fully warrant title and quiet possession to second party against any and all persons lawfully claiming or to claim the whole or any part thereof upon the completion of said contract bearing even date herewith and the payment of fifty-cents per M. feet, board measure and the piling and burning of brush as herein provided.

IN WITNESS WHEREOF the parties have



hereunto set their hands and seals this 15th day of October, A. D. 1912.

STACK-GIBBS LUMBER COMPANY.

By WM. DOLLAR,

Treas.

RUDOLPH SCHULTZ. [14]

State of Idaho,

County of Kootenai,—ss.

On this 15th day of October, A. D. 1912, before me, H. F. Cleland, a notary public within and for said county, personally appeared Wm. Dollar, to me known to be the treasurer of the corporation that executed the within instrument and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal.]

H. F. CLELAND,

Notary Public.

State of Idaho,

County of Kootenai,—ss.

On this 23d day of October, A. D. 1912, before me H. F. Cleland, a notary public within and for said county personally appeared Rudolph Schultz, known to me to be the individual who executed the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written

[Seal.]

H. F. CLELAND,

Notary Public. [15]

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for Shoshone County. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Company, Defendant. Complaint. Filed this 9th day of March, 1914, John P. Sheehy, Clerk. By C. J. Callahan, Deputy. J. H. Wixom, Attorney for Plaintiff, Wallace, Idaho. Charles E. Miller, of Counsel. [16]

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*In the District Court of the First Judicial District of  
the State of Idaho, in and for Shoshone County.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

The State of Idaho Sends Greeting: To Stack-Gibbs Lumber Company, the Above-named Defendant.

You are hereby notified that a complaint has been filed against you in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, by the above-named plaintiff.

And you are hereby directed to appear and answer the said complaint within twenty days of the service of this Summons if served within said Judicial District, and within forty days if served elsewhere; and you are further notified that unless you appear and answer said complaint within the time herein specified, the plaintiff will take judg-

ment against you as prayed, in said complaint.

Witness my hand and the seal of said District Court this 9th day of March, A. D. 1914.

JOHN P. SHEEHY,

Clerk.

By C. J. Callahan,

Deputy Clerk.

[Seal of the District Court.]

C. E. MILLER and J. H. WIXOM,

Attorneys for Plaintiff.

Residence and Postoffice, Wallace, Idaho. [17]

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*In the District Court of the First Judicial District of  
the State of Idaho, in and for Shoshone County.*

No. 3493.

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Proof of Service of Summons.**

State of Idaho,

County of Kootenai,—ss.

A. P. Bailey, being duly sworn, deposes and says: That he is now and at all times hereinafter stated was a person more than 21 years of age and is not a party nor has he any interest in the case above-entitled; that on the 12th day of March, 1914, in said County and State he served the summons in the case above entitled, which is hereunto attached, on

the above-named defendant, Stack-Gibbs Lumber Company, by delivering to Bert Nelson, designated agent of defendant corporation on whom process may be served, a true copy of said summons and a true copy of the complaint filed in said action attached to said copy of summons.

A. P. BAILEY.

Subscribed and sworn to before me this 13th day of March, 1914.

D. E. DANBY,

Clerk of Dist. Court.

[Seal of District Court.] [18]

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Company, Defendant. Summons. Filed on return Mar. 19, 1914, John P. Sheehy, Clerk of District Court. By C. J. Callahan, Deputy Clerk. J. H. Wixom, C. E. Miller, Residence and postoffice address, Wallace, Idaho, Attorneys for Plaintiff. [19]

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*In the District Court of the First Judicial District of  
the State of Idaho, in and for the County of  
Shoshone.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER CO., a Corporation,  
Defendant.



**Petition for Removal.**

To the Honorable District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone.

Comes now your petitioner, the Stack-Gibbs Lumber Company, defendant in the above-entitled action, and respectfully represents to this Honorable Court:

I.

That on the 9th day of March, 1914, the above-named plaintiff filed his complaint in the above-entitled cause in the said District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, praying for a judgment against the defendant upon two causes of action:

1st. For damages alleged to have been caused the plaintiff by a breach of contract alleged to have been made by the defendant, in the sum of \$5,000.00 as the profits which the plaintiff would have made upon such contract, the further sum of \$700.00 alleged to have been expended for supplies, roads and buildings, and \$200.00 alleged to have been expended for right of way, \$1100.00 alleged to have been expended for making road, and \$255.00 alleged to have been expended by plaintiff for labor, all of which said damage was alleged to have accrued to plaintiff by reason of the alleged breach of contract by the defendant, making in all \$7255.00 claimed by the plaintiff on [20] the first cause of action for breach of contract.

2d. \$2,500.00 upon his second cause of action for damages alleged to have accrued to the plaintiff by

reason of plaintiff not being able to perform a contract entered into between the plaintiff and defendant for the purchase of certain timber by the plaintiff from the defendant because of the defendant not securing the proceeds or the anticipation profits from the first contract sued upon in the action.

## II.

That upon the 13th day of March, 1914, the summons in said action was served upon your petitioner at Gibbs in Kootenai County, Idaho.

## III.

Your petitioner further alleges that the time has not elapsed wherein petitioner is allowed under the laws and practice of the State of Idaho and the rules of the above-entitled court in which this suit is brought, to appear, plead, demur to, or answer said complaint.

## IV.

Your petitioner further avers and alleges the fact to be that at the time of the commencement of said suit, and ever since said time, and at the present time, the plaintiff, Rudolph Schultz, was and still is a resident of Shoshone County, in the State of Idaho, and that said fact is alleged and set forth in paragraph one of his complaint filed herein.

## V.

Your petitioner further avers and alleges the fact to be that your petitioner, the defendant in said suit, is now and during all the time for more than five years last passed, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, and that its principal place

of office is in said State of Michigan, and that defendant at the time of the commencement of said suit was and ever since has been and still is a citizen of the State of [21] Michigan and a resident thereof, residing and having its principal place of business at said State of Michigan, but duly authorized to do business in the state of Idaho, and said fact is alleged and set forth in paragraph two of plaintiff's complaint herein.

## VI.

Your petitioner further avers that this is a controversy between citizens of different states and that the matters in controversy in said suit exceed, exclusive of interest and costs, the sum and value of \$3,000.00 and, to wit, the sum of more than \$9,000.00.

Your petitioner herewith presents a good and sufficient bond as provided by the statutes in such cases that it will enter in the District Court of the United States for the District of Idaho, Northern Division, within thirty days from the date of filing this petition, a certified copy of the record in the above cause, for paying all costs that may be awarded by said District Court, if it shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make an order of removal as required by law, and to accept the bond presented herewith and to direct a transcript of the

record herein to be made for said District Court as provided by law.

THE STACK-GIBBS LUMBER COMPANY,

By WM. DOLLAR,  
Its Secretary and Treasurer.

[Corporate Seal.]

REESE H. VOORHEES,

Residence and P. O. Address, Spokane,  
Washington,

EZRA R. WHITLA,

Residence and P. O. Address, Coeur d' Al-  
ene, Idaho,

Attorneys for Petitioner. [22]

State of Idaho,

County of Kootenai,—ss.

William Dollar, being first duly sworn, deposes and says: I am an officer of the Stack-Gibbs Lumber Company, a corporation, the defendant in the above-entitled action, to wit, its Secretary and Treasurer, and make this verification on its behalf, that I have read the above and foregoing petition, know the contents thereof and believe the facts therein stated to be true.

WILLIAM DOLLAR.

Subscribed and sworn to before me this 1st day of April, 1914.

[Notarial Seal.]

EZRA R. WHITLA,

Notary Public.

[Endorsed]: Due and legal service of the within and foregoing petition for removal admitted, and the



receipt and retention of a true and correct copy thereof acknowledged at Coeur d' Alene, Idaho, this 6th day of April, 1914.

J. H. WIXOM,  
CHARLES E. MILLER,  
Attorneys for Plaintiff. [23]

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Co., Defendant. Petition for Removal. Filed this 6th day of Apr., 1914, at 4 o'clock P. M. John P. Sheehy, Clerk of District Court. By C. J. Callahan, Deputy. Ezra R. Whitla, Attorney for Defendant, Residence and P. O. Address, Coeur d'Alene, Idaho. [24]

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*In the District Court of the First Judicial District  
of the State of Idaho, in and for the County of  
Shoshone.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant.

**Bond on Removal.**

KNOW ALL MEN BY THESE PRESENTS: that we, the Stack-Gibbs Lumber Company, a corporation, as principal, and the National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York,

and duly authorized to transact the business of suretyship in the State of Idaho, as surety, are held and firmly bound unto Rudolph Schultz, the plaintiff in the above-entitled cause, his heirs, executors and administrators, in the sum of five hundred (\$500.00) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us, bind ourselves and our, and each of our, successors, jointly and severally by these presents.

Dated this 1st day of April, A. D. 1914.

The conditions of this obligation are such that, whereas, the said Stack-Gibbs Lumber Company has applied by petition to the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, for the removal of that certain cause therein pending wherein Rudolph Schultz is plaintiff and said Stack-Gibbs Lumber Company, the defendant, to the District Court of the United States for the District of Idaho, Northern Division, for further proceedings, on the ground in said petition set forth, and that all further [25] proceedings in said action of said District Court of the First Judicial District in and for Shoshone County be stayed.

NOW, THEREFORE, if the said petitioner, the said Stack-Gibbs Lumber Company, a corporation, shall enter in said District Court of the United States for the District of Idaho, Northern Division, aforesaid, within thirty (30) days from the date of filing said petition, a certified copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded by the said District Court of the

United States for the District of Idaho, if said District Court of the United States shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal and surety have caused these presents to be executed by their respective duly authorized corporate officers and respective corporate seals to be affixed this 1st day of April, 1914.

STACK-GIBBS LUMBER COMPANY, a  
Corporation,

[Corporate Seal] By WM. DOLLAR,  
Its Secretary and Treasurer.

NATIONAL SURETY COMPANY, a Cor-  
poration,

NATIONAL SURETY COMPANY,  
By ISAAC M. BUSBY, and  
[Corporate Seal] EZRA R. WHITLA,  
Its Attorneys-in-Fact.

[Endorsed]: Due and legal service of the within and foregoing Bond on Removal admitted, and the receipt and retention of a true and correct copy thereof acknowledged at Coeur d'Alene, Idaho, this 6th day of April, 1914.

J. H. WIXOM,  
CHAS. E. MILLER,  
Attorneys for Plaintiff. [26]

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Co., De-

fendant. Bond on Removal. Approved April 6th, 1914. W. W. Woods, Judge. Filed this 6th day of Apr. 1914, at 4 o'clock P. M. John P. Sheehy, Clerk of District Court. By C. J. Callahan, Deputy. Ezra R. Whitla, Attorney for Defendant, Residence and P. O. Address, Coeur d'Alene, Idaho. [27]

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*In the District Court of the First Judicial District  
of the State of Idaho, in and for the County of  
Shoshone.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corpora-  
tion,

Defendant.

**Notice of Filing Petition and Bond for Removal.**

To the Above-named Plaintiff in the Above-entitled Action and to J. H. Wixom and C. E. Miller, Attorneys for Said Plaintiff:

Please take notice that the defendant herein will on the 6th day of April, 1914, at the hour of 2:30 o'clock P. M. of said day, file the petition attached hereto with the clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and will at said time, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, present said petition and bond, of which the attached is a copy, to the above court and ask that an order, a copy of which is attached hereto, be made and entered herein



removing this case to the District Court of the United States for the District of Idaho, Northern Division.

REESE H. VOORHEES,

Residence and P. O. Address,  
Spokane, Washington,

EZRA R. WHITLA,

Residence and P. O. Address,  
Coeur d'Alene, Idaho,  
Attorneys for Defendant.

[Endorsed]: Due and legal service of the within and foregoing Notice admitted and the receipt and retention of a true and correct copy thereof acknowledged [28] at Coeur d'Alene, Idaho, this 6th day of April, 1914.

J. H. WIXOM,

CHAS. E. MILLER,

Attorneys for Plaintiff.

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Co., Defendant. Notice of Filing Petition and Bond for Removal. Filed this 6th day of Apr. 1914, at 4 o'clock P. M. John P. Sheehy, Clerk of District Court. By C. J. Callahan, Deputy. Ezra R. Whitla, Attorney for Defendant, Residence and P. O. Address, Coeur d'Alene, Idaho. [29]

*In the District Court of the First Judicial District  
of the State of Idaho, in and for Shoshone  
County.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corpo-  
ration,

Defendant.

**Order of Removal.**

This cause came on to be heard upon the petition of the defendant herein for an order removing this cause to the District Court of the United States, for the District of Idaho, Northern Division, and it appearing to the Court that the defendant has filed its petition for said removal in due form of law, and has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States.

NOW, THEREFORE, it is hereby ORDERED and ADJUDGED that this cause be and it hereby is removed to the District Court of the United States for the District of Idaho, Northern Division, and the clerk of this court is hereby directed to make up the record of said cause for transmission to said court forthwith, and that all further proceedings in this cause in this court be and the same hereby is stayed.

Done in open court this 6th day of April, 1914.

WILLIAM W. WOODS,

Judge. [30]

[Endorsed]: Due and legal service of a copy, unsigned, of the within and foregoing Order admitted, and the receipt and retention of a true and correct copy thereof acknowledged at Coeur d'Alene, Idaho, this 6th day of April, 1914.

J. H. WIXOM,  
CHAS. E. MILLER,  
Attorneys for Plaintiff.

[Endorsed]: No. 3493. In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Co., Defendant. Order for Removal. Filed this 6th day of Apr. 1914, at 4 o'clock P. M. John P. Sheehy, Clerk of District Court. By C. J. Callahan, Deputy. Ezra R. Whitla, Attorney for Defendant, Residence and P. O. Address, Coeur d'Alene, Idaho. [31]

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**[Certificate of Clerk to Transcript on Removal.]**

*In the District Court of the First Judicial District  
of the State of Idaho, in and for the County of  
Shoshone.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

State of Idaho,

County of Shoshone,—ss.

I, John P. Sheehy, Clerk of the District Court of the First Judicial District of the State of Idaho, in

and for the County of Shoshone, do hereby certify the foregoing to be a full, true and correct copy of the following papers on file in my office in the above-entitled cause, constituting the records of said cause, to wit:

Complaint, filed Mar. 9, 1914.

Summons, filed Mar. 19, 1914.

Petition for removal, filed Apr. 6, 1914.

Bond on Removal, filed Apr. 6, 1914.

Notice of filing petition and bond for removal,  
filed Apr. 6, 1914.

Order for removal, filed Apr. 6, 1914.

as full, true, perfect, correct and complete as the same now remain on file at my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 11th day of April, A. D. 1914.

[Seal District Court]

J. P. SHEEHY,  
Clerk District Court.

[Endorsed]: Filed May 1, 1914. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy. [32]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.



**Motion to Strike Out Part of Complaint.**

Now comes the defendant, Stack-Gibbs Lumber Company, and moves the Court to strike from the first cause of action of plaintiff's complaint all of the following matters and things therein contained, to wit:

Commencing with the word "that," being the first word in paragraph six of said first cause of action, and continuing down to and including the words "financial condition," being at the insertion of the second semicolon in said paragraph and being the following matter, to wit:

"That at the time of the making of the said contract with the defendant, Exhibit 'A,' the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone, which he could and would incumber for as large amount as he could by his best endeavors obtain and that these two items constituted his entire and obtainable assets, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition."

Defendant also moved to strike from said complaint that part thereof commencing with the word "that" on the fourth semicolon in said paragraph six, on page four of said complaint, and continuing

down to and including the words "all his resources" in said paragraph, being the following matter, to wit: [33]

"That he had mortgaged his said homestead for as large amount as he was able to obtain and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of the said contract had exhausted all of his resources."

Also the following matter in said paragraph six, commencing with the word "and" immediately following the last semicolon in said paragraph, and continuing down to and including all of the balance of said paragraph, being the following matters, to wit:

"And that the plaintiff then and there, to wit, at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had, that he had mortgaged his homestead to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same."

Also moves to strike out all of paragraph seven as follows, to wit:

"That because of the refusal of the defendant to pay him, the plaintiff, the amount of money

so due to him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his contract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same.”

Defendant moved to strike out each and all of said matters as being incompetent, irrelevant, immaterial, redundant, sham and frivolous matters and things to be contained in an answer, and as not stating any cause or any part of a cause of action against the defendant, and not being properly pleaded herein as any cause of action or any state of facts against the defendant upon the contract sued on. [34]

This motion will be made and based upon the records and files of this action, and particularly the plaintiff's complaint and written contract attached thereto.

The defendant further moved to strike from the second cause of action all of the following matters and things, to wit:

Beginning with the word “that,” being the first word in paragraph three of the second cause of action, and continuing down to and including the word “same” immediately preceding the second semicolon in said paragraph three, being the following matters, to wit:

“That there was growing, standing and situate upon the said described lands the quantity of three million five hundred thousand (3,500,000) feet of mixed timber referred to and made the subject of the contract Exhibit ‘B’”

Also beginning with the word “that” immediately following the second semicolon in said paragraph three, and continuing down to and including all of the rest of said paragraph, being the following matters, to wit:

“That if the defendant had kept its several obligations entered into with the plaintiff and had not repudiated and been in default in the carrying out of its said contract, the plaintiff in the performance of his part of the said contract Exhibit ‘B’ would have readily had and made a profit of 75¢ per one thousand feet, board measure, of said mixed timber, to wit, an aggregate profit of two thousand six hundred twenty-five dollars, and by reason of the acts, repudiations, and default of the defendant, the plaintiff has been damaged in said sum.”

Defendant moves to strike out each and all of said matters as being incompetent, irrelevant, immaterial, redundant, sham and frivolous matters and things to be contained in an answer, and as not stating any cause or any part of a cause of action against the defendant, and not being properly pleaded herein as any cause of action or any state of fact against the defendant upon the contract sued on, and that said Exhibit “B” attached to and made a part of plaintiff’s complaint shows the terms and conditions of



said contract and the pleading of other terms, [35] conditions and understandings of a contract other than the written contract pleaded, are not proper to be inserted in the complaint for the purpose of stating a cause of action.

Dated this 29th day of May, A. D. 1914.

EZRA R. WHITLA,

Residence and P. O. Address, Coeur d'Alene, Idaho,

REESE H. VOORHEES,

Residence and P. O. Address, Coeur d'Alene, Idaho,

Attorneys for Defendant. [36]

State of Idaho,

County of Kootenai,—ss.

I, Ezra R. Whitla, one of the attorneys for the defendant in the above-entitled action, do hereby certify that I believe the above and foregoing motion directed to plaintiff's complaint to be well founded in point of law and that said motion is not interposed for delay.

EZRA R. WHITLA,

Attorney for Defendant.

[Endorsed]: Filed May 29, 1914, A. L. Richardson, Clerk. [37]

## JOURNAL ENTRY.

**Order on Motion to Strike out Part of Complaint.**

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Thursday, the 4th day of June, 1914. Present: Hon. FRANK S. DIE-TRICH, Judge.

No. 594.

RUDOLPH SCHULTZ,

vs.

STACK-GIBBS LUMBER COMPANY,

On this day this cause came on to be heard upon the defendant's motion to strike out parts of the complaint, and after argument by the respective counsel the Court ordered that said motion as to the 1st cause of action be sustained, thereupon the plaintiff abandoned the 2d cause of action in said complaint, and said defendant is given one week from date to file and serve a demurrer to said complaint.

[38]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant,

**Plaintiff's First Bill of Exceptions.**

Be it remembered that this action came on to be heard at the March term of said court, at the courthouse, in the City of Coeur d'Alene, on the 4th day of June, A. D. 1914, before the Court, Hon. Frank S. Dietrich, District Judge, presiding, upon the defendant's motion to strike certain portions of the complaint herein, Chas. E. Miller, Esq., appearing for the plaintiff, and Ezra R. Whitla, Esq., appearing for defendant, which said motion to strike, omitting therefrom the caption, was in words and figures as follows, to wit:

Now comes the defendant, Stack-Gibbs Lumber Company, and moves the Court to strike from the first cause of action of plaintiff's complaint all of the following matters and things therein contained, to wit:

Commencing with the word "that," being the first word in paragraph six of said first cause of action, and continuing down to and including the words "financial condition," being at the insertion of the second semicolon in said paragraph, and being the following matter, to wit:

"That at the time of the making of the said contract with the defendant, Exhibit 'A,' the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone,

which he could and would incumber [39] for as large amount as he could by his best endeavors obtain and that these two items constituted his entire and obtainable assets, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition."

Defendant also moves to strike from said complaint that part thereof commencing with the word "that" on the fourth semicolon in said paragraph six, on page four of said complaint, and continuing down to and including the words "all his resources" in said paragraph, being the following matter, to wit:

"That he had mortgaged his said homestead for as large amount as he was able to obtain, and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources."

Also the following matter in said paragraph six, commencing with the word "and" immediately following the last semicolon in said paragraph, and continuing down to and including all of the balance of said paragraph, being the following matters, to wit:

"And that the plaintiff, then and there, to wit, at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had, that he had mortgaged his homestead to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was



utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same.”

Also moves to strike out all of paragraph seven as follows, to wit:

“That because of the refusal of the defendant to pay him, the plaintiff, the amount of money so due to him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his contract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same.”

Defendant moved to strike out each and all of said matters as being incompetent, irrelevant, immaterial, redundant, sham and frivolous matters and things to be contained in an [40] answer, and as not stating any cause or any part of a cause of action against the defendant, and not being properly pleaded herein as any cause of action, or any state of facts against the defendant upon the contract sued on.

This motion will be made and based upon the rec-

ords and files of this action, and particularly the plaintiff's complaint and written contract attached thereto.

The defendant further moves to strike from the second cause of action all of the following matters and things, to wit:

Beginning with the word "that," being the first word in paragraph three of the second cause of action, and continuing down to and including the word "same" immediately preceding the second semicolon in said paragraph three, being the following matters, to wit:

"That there was growing, standing and situate upon the said described lands the quantity of three million five hundred thousand (3,500,000) feet of mixed timber referred to and made the subject of the contract Exhibit 'B.' "

Also beginning with the word "that" immediately following the second semicolon in said paragraph three, and continuing down to and including all of the rest of said paragraph, being the following matters, to wit:

"That if the defendant had kept its several obligations entered into with the plaintiff and had not repudiated and been in default in the carrying out of its said contract, the plaintiff in the performance of his part of the said contract Exhibit 'B' would have readily made and had a profit of 75¢ per one thousand feet, board measure, of said mixed timber, to wit, an aggregate profit of two thousand six hundred twenty-five dollars, and by reason of the acts, repudia-

tions and default of the defendant, the plaintiff has been damaged in said sum.”

Defendant moves to strike out each and all of said matters as being incompetent, irrelevant, immaterial, redundant, sham, and frivolous matters and things to be contained in an answer [41] and as not stating any cause or any part of a cause of action against the defendant, and not being properly pleaded herein as any cause of action or any state of fact against the defendant upon the contract sued on, and that said Exhibit “B” attached to and made a part of plaintiff’s complaint shows the terms and conditions of said contract, and the pleading of other terms, conditions and understandings of a contract other than the written contract pleaded, are not proper to be inserted in the complaint for the purpose of stating a cause of action.

Dated this 29th day of May, A. D. 1914.

EZRA R. WHITLA,

Residence and P. O. Address, Coeur d’Alene, Idaho,

VOORHEES & CANFIELD,

Residence and P. O. Address, Coeur d’Alene, Idaho,

Attorneys for Defendant.

State of Idaho,

County of Kootenai,—ss.

I, Ezra R. Whitla, one of the attorneys for the defendant in the above-entitled action, do hereby certify that I believe the above and foregoing motion directed to plaintiff’s complaint to be well founded in point of law and that said motion is not interposed for delay.

EZRA R. WHITLA,

Attorney for Defendant. [42]

The plaintiff by counsel opposed such motion on the ground that the portions of said complaint sought to be stricken by said motion were competent, relevant and material to the issues involved in said action.

Which said motion after argument for and against the same, and being submitted to and maturely considered by the Court, the Court granted the same as to the first cause of action stated in said complaint, to which ruling the plaintiff duly excepted before the Court, then and there, overruling and denying the said motion as to plaintiff's second cause of action.

And because the foregoing motion, ruling and exception, do not appear of record, I, the undersigned, the United States District Judge, who tried said action, have, on the stipulation of the parties, settled and signed this Bill of Exceptions, to the end that the same be made a part of the records herein, this 19th day of June, A. D. 1914.

FRANK S. DIETRICH,

United States District Judge.

It is hereby stipulated by and between the parties to the within entitled action, acting herein by and through their respective attorneys, that the plaintiff's Bill of Exceptions, number one, may be settled and signed by the Judge of said court, as a true Bill of Exceptions.



Dated June 15, A. D. 1914.

J. H. WIXOM,  
CHAS. E. MILLER,  
Attorneys for Plaintiff.  
REESE H. VOORHEES,  
EZRA R. WHITLA,  
Attorneys for Defendant.

[Endorsed]: Filed June 19, 1914, A. L. Richardson, Clerk. [43]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant.

**Demurrer.**

Now comes defendant and demurs to plaintiff's first cause of action, and for cause of demurrer states:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant for the reason:

(1) That it appears from Exhibit "A" attached to and made a part of said first cause of action, that the logs for which plaintiff was to receive compensation were to be scaled by a scaler to be mutually agreed upon, and said complaint does not allege that

any scaler was mutually agreed upon or any logs scaled by a scaler to be mutually agreed upon, and the scaler to be mutually agreed upon was a condition precedent to the right of the plaintiff to compensation therefor.

(2) That it appears from said contract, Exhibit "A" attached to and made a part of said first cause of action, that said plaintiff was to furnish receipts for all labor performed on the above logs or satisfactory evidence that all labor had been fully paid, and also receipts for payment of all supplies used in the logging of said timber, or satisfactory evidence that the same had been fully paid for [44] and it appears from said contract that the furnishing of such receipts or satisfactory evidence was a condition precedent to the right of compensation by said plaintiff, and said complaint does not allege, state or show that such labor or supplies were paid for by the plaintiff prior to said time, or that such receipts or evidence were furnished to the defendant.

(3) That Exhibit "A" attached to and made a part of said complaint, shows that payment of \$3.25 to be made on the 15th of each and every month for the logs placed on skids the preceding month, was conditional upon the plaintiff having the roads from the skidways to the banking ground of said logs on Pine Creek, completed, and said complaint does not allege, state or show that plaintiff had acquired a deed for said roads from the skidding ground of said logs to Pine Creek, or that he had or owned or had secured the right of way for said roads, or had built the same.

## II.

That said complaint is ambiguous, unintelligible and uncertain in this:

(a) That it alleges in paragraph six that said contract provided and required plaintiff to furnish all right of way over which to haul logs to be cut from the land at his own expense, and also alleges that plaintiff had expended for right of way the sum of \$200.00 and more than \$1100.00 for building and constructing such road and to fit the same for the purpose of hauling the logs to water, but does not allege, state or show that plaintiff had secured or had any legal contract for the right of way or use of the road or an easement for hauling logs across the land from the place of the skidding of said logs to the place where they were to be delivered in Pine Creek, or that such road had been built its entire distance sufficient or proper over which to haul said logs. [45]

(b) That said complaint alleges that said plaintiff has laid out and expended the sum of \$200.00 for right of way and \$1100 in making road and \$250 expended for labor, and seeks damages for all of said amounts and also for all profits which the plaintiff would have secured had he completed said contract, whereas, had he completed said contract the sums of money expended by him for roads, labor and in making said roads would have been consumed, and he would have received no return therefor.

(c) That in said first cause of action two causes of action are improperly commingled and united in one, to wit: A cause of action for damages for alleged

profits claimed to be recoverable because of breach of contract, and also an alleged cause of action for moneys expended as such damages in buying and building roads, which cannot be recovered in the same cause of action with the alleged profit, for the reason that it creates in the same cause of action a different element of liability for damages to which the plaintiff is not entitled.

Now comes the *plaintiff* and demurs to the second cause of action set forth in plaintiff's complaint, and for cause of demurrer states:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant in this:

(a) That the contract upon which said cause of action is based is attached to and made a part of said complaint as Exhibit "B" and shows upon its face that it was a contract for the sale of certain timber between the plaintiff and defendant whereby in consideration of plaintiff entering into another [46] contract the defendant gave him an absolute unconditional contract for the purchase of said other timber, which said contract was dated October 15, 1912, and in which the plaintiff was to have four years in which to remove said timber, and said contract is still in full force and effect and no breach thereof is alleged in plaintiff's second cause of action.

(b) That it is alleged in paragraph three of the second cause of action that the contract, Exhibit "B," was dependent upon and its carrying out was to follow the completion of the contract set out in



the first cause of action as Exhibit "A," whereas said Exhibit "B" is a separate and independent contract, the terms of which are fully contained within itself and which does not contain any statement or stipulation as set forth in paragraph three of the second cause of action, and the written contract set forth by plaintiff as the foundation of his cause of action cannot be added to or varied by the allegations of plaintiff's complaint, as said written contract is made a part thereof and shows that it was not dependent upon the contract set forth in the first cause of action and was not to follow the same, but was a complete contract, all of the terms of which are contained within itself, giving and granting to the plaintiff the timber standing upon said land in consideration of certain payments to be made by him and other conditions to be performed by him which were separate and distinct from any and all conditions in and made a part of Exhibit "A."

## II.

That said complaint is ambiguous, unintelligible and uncertain in this:

(a) That it alleges in paragraph six that said contract provided and required plaintiff to furnish all right of way over which to haul the logs to be cut from the land at his own expense and also alleges that plaintiff had expended for right of way [47] the sum of \$200.00 and more than \$1100.00 for building and constructing such road and to fit the same for the purpose of hauling the logs to water, but does not allege, state or show that plaintiff had secured or had any legal contract for the right of way or use

of the road or an easement for hauling logs across the land from the place of the skidding of said logs to the place where they were to be delivered in Pine Creek, or that such road had been built its entire distance sufficient or proper over which to haul said logs.

(b) That said complaint alleges that said plaintiff has laid out and expended the sum of \$200.00 for right of way and \$1100.00 in making road and \$250.00 expended for labor, and seeks damages for all of said amounts and also for all profit which the plaintiff would have secured had he completed said contract, whereas, had he completed said contract the sums of money expended by him for roads, labor and in making said roads would have been consumed, and he would have received no return therefor.

(c) That in said first cause of action two causes of action are improperly commingled and united in one, to wit: A cause of action for damages for alleged profits claimed to be recoverable because of breach of contract, and also an alleged cause of action for moneys expended as such damages in buying and building roads, which cannot be recovered in the same cause of action with the alleged profit, for the reason that it creates in the same cause of action different element of liability for damages to which the plaintiff is not entitled.

WHEREFORE, defendant prays judgment that this demurrer be sustained and plaintiff's complaint dismissed at plaintiff's costs and defendant have and

recover its costs and disbursements herein expended.

REESE H. VOORHEES,

Residence and P. O. Address, Spokane, Wash. [48]

EZRA R. WHITLA,

Residence and P. O. Address, Coeur d'Alene, Idaho,

Attorneys for Defendant.

State of Idaho,

County of Kootenai,—ss.

I, Ezra R. Whitla, being one of the attorneys for the defendant in the above-entitled action, do hereby certify that I believe the above and foregoing demurrers to plaintiff's first and second cause of action, and both thereof, to be well founded in point of law, and said demurrers or either thereof, are not interposed for delay but are interposed by defendant in good faith believing that the same are well founded in point of law.

EZRA R. WHITLA,

Attorney for Defendant. [49]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER CO., a Corporation,

Defendant.

**Affidavit of Service of Demurrer by Mail.**

State of Idaho,

County of Kootenai,—ss.

C. H. Nash, being first duly sworn, deposes and

says: I am a citizen of the State of Idaho, over the age of 21 years and am not a party to the above-entitled action.

That I served the defendant's demurrer to plaintiff's complaint in the above-entitled action, on the attorneys of record for the above-named plaintiff, on the 8th day of June, A. D. 1914, between the hours of 8:00 A. M. and 5 P. M. of said day, to wit, at the hour of 9:45 A. M., by depositing a true and correct copy of said demurrer in the postoffice in the city of Coeur d'Alene, Idaho, directed to C. E. Miller, one of the attorneys of record for plaintiff, at his place of residence and business in Wallace, Shoshone County, Idaho, and paid the postage thereon in advance; that there is a regular communication of United States mails from said postoffice of deposit aforesaid, to said Wallace, Shoshone County, Idaho, the place of business of said C. E. Miller.

C. H. NASH.

Subscribed and sworn to before me this 8th day of June, A. D. 1914.

[N. P. Seal]

EZRA R. WHITLA,

Notary Public.

[Endorsed]: Filed June 8th, 1914. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [50]



JOURNAL ENTRY.

**Order Sustaining Demurrer.**

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Thursday, the 19th day of November, 1914. Present: Hon. FRANK S. DIETRICH, Judge.

No. 594.

RUDOLPH SCHULTZ.

vs.

STACK-GIBBS LUMBER COMPANY.

On this day was announced the decision of the Court upon the demurrer to the complaint herein, heretofore submitted which decision is in writing and on file and in accordance therewith ordered that said demurrer be sustained in part as to the 1st cause of action and said demurrer be sustained as to the 2d cause of action. [51]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Election of Plaintiff to Stand on His Complaint.**

The plaintiff, above named, by Chas. E. Miller, his attorney, a demurrer to his complaint herein

having been heretofore sustained, now here elects to stand upon the sufficiency of his said complaint, and the court may proceed accordingly.

CHAS. E. MILLER,

Attorney for Plaintiff,

Residence and Postoffice Address, Wallace, Idaho.

[Endorsed]: Filed Nov. 25, 1914. A. L. Richardson, Clerk. [52]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corpora-  
tion,

Defendant.

**Judgment of Dismissal.**

In this action the defendant's demurrer to plaintiff's complaint having heretofore been sustained, and the plaintiff having filed his election to stand upon said complaint to which said demurrer was sustained:

Now at this day on motion of Ezra R. Whitla, one of the attorneys for defendant, it is by the Court ordered, adjudged and decreed that the defendant have and recover of and from the plaintiff its costs and disbursements herein expended, taxed at the sum of \$——.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Nov. 25, 1914. A. L. Richardson, Clerk. [53]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

AT LAW.

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Petition for Writ of Error.**

And now comes Rudolph Schultz, plaintiff herein, and says that on or about the 25th of November, A. D. 1914, this court entered judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a Writ of Error may be issued in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated may be sent to the said Circuit Court of Appeals.

J. H. WIXOM,

CHAS. E. MILLER,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 16, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy. [54]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

AT LAW.

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Assignment of Errors.**

Rudolph Schultz, plaintiff in this action, in connection with and as part of his petition for a writ of error filed herein, makes the following assignment of errors which he avers were committed by the Court in the rendition of the judgment against this plaintiff appearing upon the record, herein, that is to say:

First. For that the Court erred in its order and judgment of June 4th, A. D. 1914, in striking from the first cause of action, set forth in the plaintiff's complaint, the following paragraphs therein contained, to wit:

(a) Commencing with the word "that," being the first word in paragraph six of said first cause of action and continuing down to and including the words "financial condition," being at the insertion of the second semicolon in said paragraph, and being following matter, to wit:



“That at the time of the making of the said contract with the defendant, Exhibit ‘A,’ the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone, which he could and would incumber for as large amount as he could by his best endeavors obtain and that these two items constituted his entire and obtainable assets, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff’s financial condition.” [55]

(b) Also that part hereof commencing with the word “that” on the fourth semicolon in said paragraph six, on page four of said complaint, and continuing down to and including the words “all his resources” in said paragraph, being the following matter, to wit:

“That he had mortgaged his said homestead for as large amount, as he was able to obtain and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources.”

(c) Also the following matter in said paragraph six, commencing with the word “and” immediately following the last semicolon in said paragraph, and continuing down to and including all of the balance

of said paragraph, being the following matters, to wit:

“And that the plaintiff, then and there, to wit, at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had, that he had mortgaged his homestead to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same.”

(d) Also, all of paragraph seven as follows, to wit:

“That because of the refusal of the defendant to pay him, the plaintiff, the amount of money so due him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his contract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same.” [56]

Second. The Court erred in holding and deciding

that the portions of the complaint set out in said first assignment of error was incompetent, irrelevant, immaterial, redundant, sham and frivolous and therefore subject to be stricken.

Third. The Court erred in sustaining the motion of the defendant to strike from said complaint the paragraphs set out in said first assignment of error.

Fourth. The Court erred in sustaining the demurrer of the defendant herein, to plaintiff's first cause of action, in holding and deciding that the provision in the contract, exhibit "A," upon which said first cause of action was based which provided that the plaintiff should build roads from the skidways to the banking ground on Pine Creek, so that the logs could be hauled to Pine Creek without additional expense, was a condition precedent to the maturity of the obligation to make the first payment, provided for in said contract, exhibit "A."

Fifth. The Court erred in sustaining the demurrer of the defendant to the first cause of action of the complaint of the plaintiff.

Sixth. The Court erred in holding and deciding that the second cause of action set forth in the complaint of the plaintiff herein did not state facts sufficient to constitute a cause of action against the defendant.

Seventh. The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

Eighth. The Court rendered judgment against this plaintiff whereas judgment ought to have been

rendered in favor of the plaintiff, and against the defendant.

Wherefore the plaintiff prays that the said judgment may be reversed.

J. H. WIXOM,  
CHAS. E. MILLER,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 16, 1915. A. L. Richardson, Clerk. By P. E. Zanger, Deputy. [57]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

AT LAW.

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

**Order Allowing Writ of Error [and Fixing Amount  
of Bond].**

This 15th day of February, A. D. 1915, came the plaintiff by J. H. Wixom and Chas. E. Miller, his attorneys, and filed herein and presented to the Court his petition, praying for the allowance of a Writ of Error, an assignment intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and



further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the plaintiff giving bond according to law, in the sum of Two Hundred Dollars which shall operate a supersedeas bond.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Feb. 16, 1915. A. L. Richardson, Clerk. By P. E. Zanger, Deputy. [58]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Rudolph Schultz as principal and the National Surety Company, as sureties, are held and firmly bound unto the defendant in error, Stack-Gibbs Lumber Company, in the full sum of Two Hundred (\$200.00) Dollars to be paid to the said defendant, Stack-Gibbs Lumber Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators and successors, jointly and severally by these presents. Sealed

with our seals, and dated this 10th day of March, A. D. 1915.

Whereas, lately at a District Court of the United States for the District of Idaho, Northern Division, in a suit depending in said court, between Rudolph Schultz, plaintiff, and Stack-Gibbs Lumber Company, defendant, a judgment was rendered against the said Rudolph Schultz and the said Rudolph Schultz having obtained a Writ of Error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stack-Gibbs Lumber Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in said circuit, on the third day of May, next. [59]

Now the condition of the above obligation is such, that if the said Rudolph Schultz shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

RUDOLPH SCHULTZ. (Seal)

NATIONAL SURETY COMPANY,

A. L. NICHOLSON,

Agent.

J. H. WIXOM,

Attorney in Fact.

Sealed and delivered in the presence of  
ESTELLA PERKINS,  
MARIE PERKINS.

Approved by

FRANK S. DIETRICH,  
District Judge. [60]

State of Idaho,  
County of Shoshone,—ss.

A. L. Nicholson and J. H. Wixom being first duly sworn, each for himself and not one for the other, on oath deposes and says: That he, jointly with the other, is the attorney in fact of the National Surety Company, the surety named in the foregoing undertaking; that as such attorney in fact he is, jointly with the other, authorized to execute surety bonds and undertakings for and on behalf of the said surety company in the State of Idaho. That the said surety company has complied with all of the laws of the State of Idaho relating to such corporations and is authorized to execute bonds and undertakings, and to do business in the State of Idaho as is evidenced by the certificate now on file in the office of the County Recorder of Shoshone County, State of Idaho, and also in the office of the Secretary of State of the State of Idaho, at Boise, Idaho.

NATIONAL SURETY COMPANY.

A. L. NICHOLSON,  
Agent.

J. H. WIXOM,  
Attorney in Fact.

Subscribed and sworn to before me this 11th day of March, 1915.

[Seal]

R. E. WENIGEN,  
Probate Judge.

[Endorsed]: Filed March 20th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy. [61]

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**Order Extending Time to File Transcript.**

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant.

It appearing by suggestion that because of distance for communication and the time required to prepare and print the transcript in the above-entitled action that the period for the same allowed and required by the Writ of Error, herein, is too short, on motion of Chas. E. Miller, one of the attorneys for plaintiff in error:

IT IS ORDERED that the time in which the plaintiff in error may file the transcript, herein, be extended for a period of 30 days beyond the return day mentioned in the Writ of Error, herein.

Dated at Boise, Idaho, April 12, A. D. 1915.

FRANK S. DIETRICH,  
Judge of Said Court.



[Endorsed]: Filed April 12th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy. [62]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant.

**Praeceptum for Transcript.**

To the Clerk of Said Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause and to include in such transcript of record the following, and no other papers or exhibits, to wit:

1. Order of Removal by State Court.
2. Plaintiff's Complaint, Summons and Proof of Service.
3. Defendant's Motion to Strike Out Parts of Complaint.
4. Order Made on Said Motion.
5. Plaintiff's First Bill of Exceptions.
6. Defendant's Demurrer to Complaint.
7. Order Sustaining Such Demurrer.
8. Plaintiff's Election to Stand on Same.
9. Judgment Dismissing Action.
10. Petition for Writ of Error.

11. Assignment of Errors.
12. Order Allowing Writ of Error.
13. Order Fixing Bond on Writ of Error.
14. Bond on Writ of Error.
15. Writ of Error.
16. Citation in Error and Proof of Lodging With Clerk.
17. Admission of Service of Citation. [63]
18. This Praecipe.

CHAS. E. MILLER,  
J. H. WIXOM,  
Attorneys for Plaintiff.

[Endorsed]: Filed March 20, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy. [64]

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**[Writ of Error (Original).]**

*The United States Circuit Court of Appeals for the Ninth Circuit.*

The United States of America,  
Ninth Judicial Circuit,—ss.

The President of the United States to the Honorable  
Judge of the District Court of the United States,  
for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between Rudolph Schultz, plaintiff, and Stack-Gibbs Lumber Company, defendant, a manifest error hath happened, to the great damage of the said Rudolph Schultz, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, on the 19th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 20th day of March, A. D. 1915, in the 139th year of the independence of the United States of America.

[Seal]            Attest: A. L. RICHARDSON,  
Clerk of the District Court of the United States, District of Idaho.

By Pearl E. Zanger,  
Deputy.

Allowed by

FRANK S. DIETRICH,  
U. S. District Judge. [65]

[66]

[Endorsed]: No. 594. The United States Circuit Court of Appeals for the Ninth Circuit. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Company, Defendant. Writ of Error. Filed on Return April

7, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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**[Citation on Writ of Error (Original).]**

*The United States Circuit Court of Appeals for the Ninth Circuit.*

The United States of America,  
Ninth Judicial Circuit,—ss.

To Stack-Gibbs Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said circuit, on the 19th day of April next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Idaho, wherein Rudolph Schultz, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, District Judge of the United States for the District of Idaho, at Boise, within said circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and fifteen, and of the independence of the



United States of America, the one hundred and thirty-nine.

FRANK S. DIETRICH,  
United States District Judge.

[Seal]

Attest: A. L. RICHARDSON,  
Clerk.

We hereby this 31 day of March, A. D. 1915, accept due personal service of this citation on behalf of Stack-Gibbs Lumber Company, the defendant in error.

EZRA R. WHITLA.

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Attorneys for Defendant in Error, [67]

[Endorsed]: No. 594. The United States Circuit Court of Appeals for the Ninth Circuit. Rudolph Schultz, Plaintiff, vs. Stack-Gibbs Lumber Company, Defendant. Citation. Filed on Return April 7, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

[68]

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**[Return to Writ of Error.]**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,  
Clerk.

By Pearl E. Zanger,  
Deputy Clerk. [69]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

RUDOLPH SCHULTZ,

Plaintiff,

vs.

STACK-GIBBS LUMBER COMPANY,

Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 70, inclusive, contain true and correct copies of the Complaint, Summons, Proof of Service of Summons, Petition for removal, Bond on Removal, Notice of Filing Petition Bond for Removal, Order of Removal, Clerk's Certificate to Transcript Removed to State Court, Motion to Strike Out Part of Complaint, Order on Motion to Strike Out Part of Complaint, Plaintiff's First Bill of Exceptions, Demurrer, Order Sustaining Demurrer, Election of Plaintiff to Stand on His Complaint, Judgment of Dismissal, Petition for Writ of Error, Assignment of Error, Order Allowing Writ of Error, Bond on Writ of Error, Praecipe for Transcript, Order Extending Time to File Transcript, Original Writ of Error, Original Citation, Return to Record and Clerk's Certificate, which together constitute the transcript of the record herein

upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$40 and that the same has been paid by the Appellant.

WITNESS my hand and the seal of said court, affixed at Boise, Idaho, this 21st day of April, 1915.

[Seal]

A. L. RICHARDSON,

Clerk.

By Pearl E. Zanger,

Deputy Clerk. [70]

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[Endorsed]: No. 2604. United States Circuit Court of Appeals for the Ninth Circuit. Rudolph Schultz, Plaintiff in Error, vs. Stack-Gibbs Lumber Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Filed May 1, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit

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RUDOLPH SCHULTZ,

*Plaintiff in Error.*

*vs.*

STACK-GIBBS LUMBER COMPANY,

*Defendant in Error.*

} At Law

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Brief for Plaintiff in Error

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Upon Writ of Error to the United States District  
Court for the District of Idaho,  
Northern Division.

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CHAS. E. MILLER,  
JUSTIN H. WIXOM,

*Counsel for Plaintiff in Error.*

P. O. Address, Wallace, Idaho.



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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RUDOLPH SCHULTZ,

*Plaintiff in Error.*

*vs.*

STACK-GIBBS LUMBER COMPANY,

*Defendant in Error.*

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} At Law

STATEMENT OF THE CASE.

This is an action brought to recover damages for the breaches of two logging contracts, entered into contemporaneously between the same parties, at Kootenai County, Idaho. The complaint contained two causes of action, the two contracts being attached to and made a part of the same, and the breaches were stated separately.

The defendant in error, defendant below, first interposed a motion to strike certain portions of the complaint as being incompetent, irrelevant, immaterial, redundant, sham and frivolous matters and things, which motion was granted by the Court as to

four paragraphs of the first cause of action, as appears from the Bill of Exceptions herein.

Thereafter defendant in error demurred to the entire complaint and the demurrer was sustained. The plaintiff in error electing to stand on his complaint, judgment of dismissal and for costs was entered. The cause comes here on writ of error.

The first cause of action recites that on or about October 15th, 1912, the defendant was the owner of certain lands in Shoshone County, Idaho, having grown thereon large quantities of merchantable white and yellow pine timber and a large quantity of mixed and other varieties of tree; that the defendant was then and ever since has been engaged in operating a saw-mill for the purpose of manufacturing logs into lumber and wood products; that the plaintiff had been, for a long time, engaged in logging timber and was experienced and skilled therein; that on or about said October 15, 1912, the plaintiff and defendant entered into a contract in writing, a copy of which, marked Exhibit "A", was attached to the complaint, whereby the defendant contracted with the plaintiff for the cutting and removal of all the merchantable white and yellow pine timber, standing, growing, and being upon said lands and providing that said white and yellow pine timber should be cut and removed from said lands on or before June 1st, 1914; that upon the execution and delivery of said contract, made in duplicate, the plaintiff entered upon the performance of his part of the same and employed a large number of men to assist therein, purchased and leased



the right of way for the necessary roads and skidways, at a cash outlay of more than \$1,100.00, purchased and furnished teams and invested a large amount of money, to-wit: More than \$700.00 in camp equipage, tools and supplies, and expended the sum of \$225.00 for labor, and by December 15, 1912, had fully cut and placed upon skids 250,000 feet of white and yellow pine and in addition thereto felled 100,000 feet of similar timber ready to place upon skids, and in every way complied with the conditions of said contract upon his part; that under the terms of said contract it was provided that on the 15th day of each month for all white pine and yellow pine logs, the plaintiff was to place or caused to be placed on skids for transportation, the defendant was to pay plaintiff the sum of \$3.25 for each 1000 feet of logs, board measure, placed upon said skids and that in accordance with said contract the plaintiff had fully cut and placed upon said skids 250,000 feet of white and yellow pine as aforesaid and that then and there it became and was the duty of the defendant to pay plaintiff the sum of \$3.25 per 1000 feet of logs, board measure, placed upon said skids and that in accordance with said contract the plaintiff had fully cut and placed upon said skids 250,000 feet of white and yellow pine as aforesaid, and that then and there it became and was the duty of the defendant to pay plaintiff the sum of \$3.25 per 1000 feet, the said logs having been scaled as required by said contract and amounting in the aggregate to the sum of \$812.50; that at the time of the making of said contract, Ex-

hibit "A", the plaintiff had to his credit in bank the sum of \$700.00, his total cash capital, of which fact he informed the defendant; that he, further, then and there informed the defendant that he owned a homestead in said County which he could and would incumber for as large amount as he could by his best endeavors obtain, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition; that among other things the said contract provided and required that the plaintiff should furnish the right of way over which to haul the logs from said lands; *that on or about the said October 15, 1912, the plaintiff had expended for right of way for said road the sum of \$200.00, more than \$1100.00 to construct said road and to fit the same for the purpose of hauling said logs to water, and had, in addition, expended for supplies and rent of buildings more than \$700.00; that he had mortgaged his said homestead for as large amount as he could obtain, and that the expenditures made in and about the said business by plaintiff and required to be made under the said contract, he had exhausted all of his resources; that on said last mentioned date, the same being due under said contract, the plaintiff requested the defendant to pay him the sum of \$812.50 for the logs already placed upon the skids as aforesaid, which said sum or any other sum the defendant refused and neglected to pay, and that upon four different other times plaintiff had demanded from defendant payment of said sum and the defendant neglect-*

ed and refused to pay said amount or any portion thereof to plaintiff for his said services and carrying out his part of said contract; that the plaintiff, then and there, to-wit: at the time of the first refusal and the subsequent refusals to pay, had expended all the cash money which the said plaintiff had, had mortgaged his homestead, to enable him to carry out his part of said contract, had exhausted all of his resources and was utterly unable to obtain money or further credit from any source whatever, and that, unless the defendant paid him the amount aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant, and the defendant was fully cognizant of the same; that because of the refusal to pay him, the plaintiff, the amount of money so due him, the payment of which would have enabled him readily to proceed with his contract and to carry out his part of the same, the defendant having refused to pay him the same, the plaintiff was unable to complete his part of the said contract and to go on with the same, and because of the acts of the defendant aforesaid, the plaintiff was obliged to suspend all efforts to carry out his part of said contract and to abandon the same; that there was growing upon the said lands hereinbefore described 3,500,000 feet of yellow pine and 1,500,000 feet of white pine, all of which would have been cut, felled and transported by plaintiff, in accordance with his part of said contract, if the defendant had not repudiated its obligations to pay to plaintiff for his work and labor the

amount, on the time and in the manner provided by said contract, and the plaintiff not been prevented from carrying out said contract by the acts of the defendant; that had the plaintiff been permitted to carry out his part of said contract he would have had a profit thereon of the sum of \$1.00 per 1000 feet, board measure, of the aggregate of said timber, to-wit: five million feet; and that by reason of the default of the defendant and its repudiation of its said contract, Exhibit "A", the plaintiff had been damaged in the sum of \$5000.00, which he would have realized as profits upon his said contract, the sum of \$700.00 expended by him for supplies and rent of building, the sum of \$200.00 expended by him for right of way, *\$1100.00 expended by him for making said road way*, and \$255.00 expended by him for labor, all of which was lost to him by reason of the said acts of defendant.

The plaintiff prayed judgment against the defendant, on said first cause of action, for the sum of \$7255.00 and his costs.

In stating his second cause of action, the plaintiff adopted paragraphs 1, 2 and 3 of his first cause of action and made the same a part thereof.

The plaintiff further alleged that on October 15, 1912, in consideration of the plaintiff having entered into the contract, Exhibit "A", the defendant entered into a contract with plaintiff in writing, whereby the defendant agreed to sell to plaintiff and the plaintiff agreed to purchase from defendant, all timber growing up the lands described in the first cause of action



other than the merchantable white and yellow pine growing, situate and being thereon, to-wit: All mixed white fir, red fir, tamarack, spruce, black pine and cedar timber, at and for the price and sum of 50c per 1000 feet, the plaintiff to have four years to cut and remove the same, a copy of which contract, marked Exhibit "B", was attached to and made a part of the said complaint, the said contract Exhibit "A" being specially referred to in said Exhibit "B"; *that the said contract Exhibit "B" was dependent upon and in its carrying out was to follow the completion of the contract Exhibit "A"*, and that by reason of the repudiation and default of the defendant described in paragraphs 4, 5, 6 and 7, stated in said first cause of action to which reference was had, and the same was made a part of his statement of his second cause of action, the plaintiff was prevented from carrying out his part of the contract described in Exhibit "B" attached to his complaint, and he was obliged, because of the said acts of the defendant, to abandon the same; that there was growing, standing and situate upon the said lands 3,500,000 feet of mixed timber, referred to and made the subject of the contract of Exhibit "B"; that if the defendant had kept its several obligations, entered into with the plaintiff and had not repudiated and been in default in the carrying out of its said contracts, the plaintiff, in the performance of his part of said contract, Exhibit "B", would have made a profit of 75c per 1000 feet, board measure, of said mixed timber, to-wit: an aggregate profit of \$2625.00,

and by reasons of the acts, repudiations and default of the defendant, the plaintiff had been damaged in the said sum. Upon his second cause of action the plaintiff prayed judgment in the sum of \$2625.00 and his costs, making an aggregate judgment of \$9880.00 upon both causes of action.

After the motion to strike portions of the complaint setting out the first cause of action, the defendant interposed a special demurrer to both causes of action upon, substantially the following grounds:

1. That it does not appear from the complaint that the logs in question were scaled as provided in the contract and that the clause in the contract providing for scaling the logs cut is a condition precedent.

2. That it does not appear from the complaint that the plaintiff furnished defendant with receipts showing the payment of all labor and supplies connected with said logging operation.

3. That it does not appear from the complaint that plaintiff acquired and constructed the roads referred to in contract.

4. That recovery of special damages is erroneously sought.

5. That two causes of action are improperly united.

6. Sufficiency of complaint in pleading the second cause of action.

## SPECIFICATION OF ERRORS.

*First.* For that the Court erred in its order and judgment of June 4th, A. D. 1914, in striking from the first cause of action, set forth in the plaintiff's complaint, the following paragraphs therein contained, to-wit:

Commencing with the word "that," being the first word in paragraph 6 of said first cause of action, and continuing down to and including the words "financial condition," being at the insertion of the second semicolon in said paragraph, and being the following matter, to-wit:

"That at the time of the making of the said contract with the defendant, "Exhibit A", the plaintiff had to his credit in the bank the sum of about seven hundred dollars, his total cash capital, of which fact he informed the defendant; that he further, then and there, informed the defendant that he owned a homestead at or near Kingston, in said County of Shoshone, which he could and would incumber for as large amount as he could by his best endeavors obtain, and that these two items constituted his entire and obtainable assets, all of which he informed the defendant, and the defendant then and there well knew the same and was fully advised of the plaintiff's financial condition."

Also that part thereof commencing with the word "that" on the fourth semicolon in said paragraph 6, on page 4 of said complaint, and continuing down

to and including the words "all his resources" in said paragraph, being the following matter, to-wit:

"That he had mortgaged his said homestead for as large amount as he was able to obtain and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources."

Also the following matter in said paragraph 6, commencing with the word "and" immediately following the last semicolon in said paragraph, and continuing down to and including all of the balance of said paragraph, being the following matter, to-wit:

"And that the plaintiff, then and there, to-wit: at the time of the first refusal and at the subsequent refusals to pay, had expended all of the cash money which he, the plaintiff, had, that he had mortgaged his homestead to enable him to carry out his part of said contract; that he had exhausted all of his resources and that he was utterly unable to obtain further money or credit from any source whatever, and that unless the defendant paid him the amount so due to him as aforesaid, he would be unable to carry out his part of said contract, all of which facts were fully understood by the defendant and the defendant was fully cognizant of the same."

Also, all of paragraph 7, as follows, to-wit:

"That because of the refusal of the defendant to pay him, the plaintiff, the amount of money so due him, as aforesaid, the payment of which would have enabled the plaintiff readily to proceed with his con-



tract and to carry out his part of the same, but the defendant having refused to pay the same, the plaintiff was unable to complete his part of the said contract and to go on with the same and because of the acts of the defendant, aforesaid, he, the plaintiff, was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same."

*Second.* The Court erred in holding and deciding that the portions of the complaint set out in said first assignment of error was incompetent, irrelevant, immaterial, redundant, sham and frivolous and therefore subject to be stricken.

*Third.* The Court erred in sustaining the motion of the defendant to strike from said complaint the paragraphs set out in said first assignment of error.

*Fourth.* The Court erred in sustaining the demurrer of the defendant herein, to plaintiff's first cause of action, in holding and deciding that the provision in the contract, Exhibit "A", upon which said first cause of action was based, which provided that the plaintiff should build roads from the skidways to the banking ground on Pine Creek, so that the logs could be hauled to Pine Creek without additional expense, was a condition precedent to the maturity of the obligation to make the first payment, provided for in said contract, Exhibit "A".

*Fifth.* The Court erred in sustaining the demurrer of the defendant to the first cause of action of the complaint of the plaintiff.

*Sixth.* The Court erred in holding and deciding that the second cause of action set forth in the com-

plaint of the plaintiff herein did not state facts sufficient to constitute a cause of action against the defendant.

*Seventh.* The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

*Eighth.* The Court rendered judgment against this plaintiff whereas judgment ought to have been rendered in favor of the plaintiff, and against the defendant.

### ARGUMENT.

The theory of the right of recovery by the plaintiff in error was so completely denied by the emasculation of his complaint in granting the motion to strike, as set forth in the bill of exceptions, that any probable result, thereafter, appeared to be negligible. Hence, while the expense of the record was within his possible reach, he has brought his contention here.

In framing the complaint and alleging the damages, the case of Skagit Railway and Lumber Company vs. Cole, 2 Wash. 57, and cases there cited, were closely followed. If the rule there announced is the correct one, the motion, here, to strike, should have been denied; if this Court shall disagree with those cases and announce the contrary doctrine, then the plaintiff in error is, virtually, without any remedy.

The Washington case, above referred to, was brought to recover damages in the sum of \$7575.00 for an alleged breach of contract entered into between the

appellant and appellee, by which the appellant let to the appellee, for a certain term of years, mentioned in the contract, certain lands therein described, and, in consideration of the sum of \$1.50 per thousand feet of stumpage, sold and gave him license to cut saw logs, piles and spars upon said lands during such time; and further agreed to furnish to said appellee at the reasonable market price all the provisions and logging supplies needed by him during the continuance of said contract. The appellee claimed that he entered upon the performance of his part of the contract, and employed a large number of teams, and invested a large amount of money in camp equipment, tools, etc., and in every respect fulfilled all the conditions of the contract on his part, but that during the months of July and August and the first part of September, 1888, the appellant refused to furnish him logging supplies and provisions, as provided in the contract, and that in consequence of such failure the appellee made 13 trips from his logging camp to the place of business of the appellant at an expense of \$195.00 for the purpose of procuring such supplies, but in consequence of the appellant's failure to furnish them, these trips were made useless; and claimed further that, during this period, in consequence of appellant's failure to furnish such supplies, the business of the appellee was interrupted and his teams compelled to remain idle, to his damage in the sum of \$450.00. The appellee claimed further that the appellant failed and refused to supply him with provisions and logging appliances, as provided in said contract from

the 12th day of September, 1888, for a period of six weeks continuously, and in consequence of such failure the appellee was unable to carry on his business and was compelled to shut down his camp and suspend his business for a period of six weeks, causing him damage to the amount of \$2000.00. He claimed further that on the 5th day of June, 1889, at the most advantageous time for logging, the appellant again refused to supply him with provisions and logging appliances as provided in the contract, and notified him it would no longer comply with the terms of its contract, and has ever since failed and refused to do so, and in consequence of such failure, the men employed by the appellee abandoned their labors in the camp, and the appellee was unable to procure supplies or subsistence, or to maintain or operate his business to the extent of his ability, and, in place of 45,000 feet of saw logs per day, which he had been putting into the market, he was only able to put in 20,000 feet per day, causing him damage to the extent of \$3000.00.

Mr. Justice Scott, in rendering the opinion of the Court uses the following language upon the questions analogous to those involved here:

"As to the inadmissibility of the evidence objected to under the pleadings, while the complaint did not contain a direct allegation that appellant knew the appellee was unable to procure supplies elsewhere, it did contain the following statement: 'That, at the time of purchasing said timber from the said defendant as aforesaid, plaintiff, for want of sufficient means, was unable to employ and pay a requisite



number of men and to purchase the extra number of teams and tools necessary for plaintiff to have to enter upon said described premises and to make logging roads thereon so as to transport said timber to market, and to purchase a sufficient supply of goods, wares, and merchandise to enable plaintiff to carry on so extensive a logging business and remove said timber from said described premises during the limited period aforesaid; and in order to induce the said plaintiff to purchase said timber from the said defendant, and to induce the said plaintiff to remove the said timber from the said premises aforesaid within the respective periods of time aforesaid and in consideration of the said plaintiff's purchasing said timber and agreeing to remove the same within the time aforesaid, the said defendant then and there contracted and agreed to and with the said plaintiff to furnish plaintiff with the means with which to employ and pay men, purchase teams, tools, etc., to properly conduct and carry on said business, and to sell, furnish, and deliver to said plaintiff all the provisions and logging supplies needed by said plaintiff upon credit.' There was testimony also to show that the parties had transacted business with each other before entering into this contract, and appellant's vice-president testified that at the time the contract was made appellant knew Cole had no money, and that it would have to back him in the enterprise, and knew he could not get along without such assistance. From all the circumstances connected with this mat-

ter we are satisfied appellant did not sustain any injury therein.

“As to the basis upon which appellee was entitled to recover damages, a long list of authorities was presented by each party, which it is difficult, if not impossible, to harmonize. The position taken by appellee and sanctioned by the superior court is sustained by a number of cases very similar to this one. If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew when it ceased furnishing the same that the result would be to compel appellee to abandon the enterprise, or seriously to embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act, and to be answerable in damages therefor. Nor do we think the damages too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which the logs, spars, and piles could be manufactured; and, at the time of the breaches, there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself when gotten out was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof. Indeed, some of the cases go to a much

greater extent than it is necessary to go in this case to sustain the rule of damages adopted at the trial. Of the authorities presented upon the question of damages we cite the following as supporting this case: *Shepard v. Gas-Light Co.*, 15 Wis. 349; *Booth v. Rolling-Mill Co.*, 60 N. Y. 487; *Richardons v. Chynoweth*, 26 Wis. 455; *Crescent Manuf'g. Co. v. N. O. Nelson Manuf'g. Co.*, 100 Mo. 325; *Houser v. Pearce*, 13 Kan. 104; *Benj. Sales*, 870; 1 *Suth. Dam.*, pp. 75, 90, 91, 106-116."

In the case of *Graham vs. McCoy et al.*, 17 Wash. 63, the Washington Supreme Court cites *Skagit Railway and Lumber Co. vs. Cole*, *supra*, as an authority and reaffirms the principles of that case. In point of facts, this case is almost a counterpart of the case at bar and the law issues were the same as here.

Mr. Justice Reavis, in his opinion, among other matters, uses the following language:

"If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew, when it ceased furnishing the same, that the result would be to compel appellee to abandon the enterprise, or to seriously embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act, and to be answerable in damages therefor. Nor do we think the damage too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which

the logs, spars, and piles could be manufactured; and, at the time of the breaches, there was the benefit of past experience, the known results of previous efforts in carrying on the work, from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself, when gotten out, was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof." We think the better-considered authorities elsewhere maintain this rule for the measurement of damages, and sustain its application in the case at bar."

The leading case is again cited with approval by the Washington Supreme Court in *Federal Iron & Brass Bed Co. vs. Hock*, 42 Wash. 668, and the following observation by Mr. Justice Root is extremely pertinent here:

"The action of the trial court in striking the affirmative answer and counterclaim, and in sustaining the demurrer is assigned as error, as is also the denying of appellant's motion for a new trial. We think these rulings of the trial court were erroneous. It is doubtless true that prospective profits are oftentimes speculative, indefinite, and imaginary, but here there is a reasonable certainty as to some future profits. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all merely speculative and conjectural or of a character incapable of legal ascertainment. Oftentimes in the breach of a contract of this character the only damages sustained are those of future profits. These



may be of a substantial character in contemplation of law, and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions, may be deemed to have been reasonably certain had the breach not occurred. In the case of *Wakeman v. Wheeler and Wilson Mfg. Co.*, 101 N. Y. 205, the Court of Appeals of New York said: 'Most contracts are entered into with the view to future profits, and such profits are in contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rule of damages, to determine the compensation to be awarded for the breach.' See also *Lumber Co. v. Cole*, 2 Wash. 57; *Shepard v. Gaslight Co.*, 15 Wis. 349; *Goldhammer v. Dyer*, 7 Colo. App. 29."

The leading case is again cited and followed in *Goldhammer vs. Dyer*, 7 Colo. App. 29.

Plaintiff leased a boarding house from defendant, the latter agreeing to furnish her groceries on monthly credit, she having given a chattel mortgage on fur-

niture of her own to pay for other furniture to secure payment of rents.

After possession and entering the business, defendants refused to extend the agreed credit and foreclosed the mortgage, thus stopping and ruining plaintiff's business; she brought suit for profits and a recovery was sustained.

Generally, as to the breach of contract, damages, and recovery of profits, we refer the Court to paragraphs 4, 5 and 6 of the syllabus in the case of *Anvil Mining Co. vs. Humble et al.*, 153 U. S. 540, stated as follows:

"4. Profits may be recovered as damages for breach of a contract for mining ore where they are not uncertain or remote, and were obviously within the intent and mutual understanding of both parties when the contract was made.

"5. Whenever one party to a contract prevents the other party from going on with it, the other party is at liberty to treat the contract as broken and abandon it, and recover as damages the profits which he would have received through full performance.

"6. When a contract is not performed the party who is guilty of the first breach is generally the one upon whom rests all the liability for the non-performance."

It is clear that the demurrer to the first count, upon the ground that the same insufficiently alleges performance of conditions precedent, is not well taken. The complaint, in addition to specifically alleging performance of such conditions, states in paragraph 4 that the Plaintiff

"in every respect complied with the conditions of the said contract upon his part."

By express provision of the Idaho Law such plea is all that is required. Section 4212 of the Idaho Code of Civil Procedure provides:

In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance.

It is therefore earnestly contended that the performance of all conditions precedent is clearly and amply alleged in the complaint and that the demurrer should accordingly have been overruled.





## ARGUMENT AS TO DEMURRER.

(a) The provisions of the contract upon which the first three grounds of the demurrer are based are referred to by defendant as conditions precedent.

Condition precedent is defined in 8 Cyc. 558 as a condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect.

Says the Iowa Supreme Court: "We cannot accede to the doctrine that the provisions under consideration are conditions precedent; a condition precedent, as applied to the contract, is a condition which must be performed before the agreement of the parties becomes a valid contract," citing *Redman vs. Insurance Co.*, 49 Wis. 431; *Jones vs. U. S. Mut. A. A.*, 61 N. W. 487.

However, the complaint avers, paragraph 5, page 3, that the logs, in the payment for which the defendant has defaulted, had been scaled as required by the contract. In paragraph 4, last two lines, it is averred that the plaintiff had complied with the conditions of his contract in every respect.

All of the matters set forth in the first three grounds of the demurrer are matters of defense, pure and simple, and are not required to be specially pleaded by the plaintiff. And, generally, the complaint comes squarely within the decisions of this State.

Where a complaint states the ultimate facts, etc., and is sufficiently specific to enable answer, it is sufficient.

*Carscallen vs. Coeur d'Alene & Co.*, 15 Idaho 444-450.

*McLean vs. City of Lewiston*, 8 Idaho 472.

Implications and presumptions of law need not be pleaded.

*Bates vs. Capital State Bk.*, 18 Idaho 429.

The construction of a pleading is to be such as a fair and reasonable intendment may imply.

*McCormick vs. Smith*, 23 Ida. 487.

And there should be a liberal construction with a view to substantial justice.

*Same vs. Same.*

"It is true that the complaint is not as specific as some pleaders would have made it, but we think the ultimate facts therein stated constitute a cause of action. In this class of cases the pleader must state all facts necessary to inform the defendant of all acts or omissions that are charged against the defendant, so as to enable him to make a full and complete defense thereto. It is an established rule of pleading that probative facts need not be pleaded."

*McLean vs. City of Lewiston*, 8 Idaho 482.

*Carscallen vs. Coeur d'Alene Co.*, 15 Idaho 450.

Under the provisions of our Code, the technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out

of court only when upon his facts he is entitled to no relief either at law or in equity.

*Rauh vs. Oliver*, 10 Idaho 9.

*Elliott vs. Collins*, 6 Idaho 266.

Implications of law arising from the facts stated, need not be pleaded and presumptions of law need not be averred.

*Bates vs. Capital State Bk.*, 18 Idaho 435.

(The above action was one of claim and delivery and it was objected that the complaint did not show the plaintiff entitled to immediate possession—a condition precedent, etc.)

Sec. 4207 Rev. Codes provides for a liberal construction of pleadings with a view to substantial justice between the parties. It does not appear that the defendant has been misled because of the clerical errors in those dates. A pleading should be construed so as to allege all of the facts that can be implied by fair and reasonable intendment from the facts stated.

*McCormich vs. Smith*, 23 Idaho 493.

The Revised Codes of Idaho provide as follows:

“Sec. 4207. In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties.”

(b) The objections raised to the recovery of special damages, go to the measure of damages, and are hardly the subject of demurrer. The Court will take care of that branch of the case in instructing the jury.

The right of plaintiff to recover for money expended on the roads would seem to be clear; he owned the right of way and the roads. When the contract was completed, he would still own them, could sell them, or use them for other operations, and his property would remain in them. Because of the defendant's conduct in bankrupting him, the plaintiff lost his property.

(c) The two causes of action are not improperly united under the laws of Idaho. Both are express contracts in writing, made contemporaneously, between the same parties. Exhibit "B" refers expressly to Exhibit "A", and it appears clearly from the two documents that the former was to succeed and follow the latter and they are complements of each other.

The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied.

\* \* \* \*

#### Chap. 23, Laws of 1913, page 92.

Seven classes of causes of action may be united under this statute. In the case at bar, the two causes stated both belong to Class 1; they affect all the parties to the action; they do not require separate places of trial; and they are separately stated.



## CONCLUSION.

## I.

*Motion to Strike.*

The breach of the contract complained of was the failure of the defendant in error, to make the payment of \$812.50 due on November 15, 1912, by reason of which, because the plaintiff in error had exhausted his financial means and credit, his status being well known to the defendant in error, the abandonment of the contract was forced. If the act of the defendant in error was a breach of the contract, then, certainly, a cause of action exists. By this act, and persistence in the same, the plaintiff in error was prevented from carrying out the contract on his part. The defendant in error had been fully advised, in advance, of the exact financial position of the plaintiff in error and it knew that the latter had just barely sufficient means to reach to the time when the first payment would mature. And this must have been in contemplation of the parties when the contract was made.

It is said in *Taylor vs. Bradley*, 39 N. Y. 129, that the only rule which will do justice to the parties is that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure. What was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, submit to labor and appropriation

of his stock. His damages are what he lost by being deprived of his chance of profit.

On a trial, the plaintiff in error would have been required to show why he did not go on with the contract. His reason was that he was financially unable to do so, because of a situation of which the defendant was fully informed. He must justify the recession of the entire two contracts. If it was incumbent upon him to sustain these matters by evidence, he must allege them in his pleadings that the adversary may have notice.

## II.

### *Demurrer.*

The Court below sustained the demurrer to the first cause of action upon the sole ground that there was no direct allegation that the plaintiff had built roads from the skidways to the banking ground on Pine Creek.

Paragraph 4 of the first cause of action, beginning in the second line, recites that "the plaintiff entered upon the performance of his part of the same and employed a large number of men, secured by purchase and lease the right of way for the necessary roads and skidway at a cash outlay of more than eleven hundred dollars, \* \* \* and in every respect complied with the conditions of the said contract upon his part."

It is recited in paragraph 6 of the complaint, immediately following the first paragraph stricken, as follows:

“ \* \* \* that among other things the said contract provided and required that the plaintiff should furnish all right of way over which to haul the logs to be cut from the said lands at his own expense; that on or about the said November 15, A. D. 1912, the plaintiff had expended for right of way for said road the sum of two hundred dollars and more than eleven hundred dollars for building and constructing such road and to fit the same for the purpose of hauling the logs to water.”

This provision was, undoubtedly, overlooked by the Court below, as the greater portion of paragraph 6 had been stricken, a very easy and natural oversight.

Besides, the failure of the plaintiff in error, to actually construct these roads would be matter of defense and not such an omission in pleading as could properly be reached by demurrer.

The Court below sustained the demurrer to the second cause of action upon the ground that it did not appear that the two contracts, Exhibits “A” and “B”, were interdependent—that one could not be performed without also performing the other. We submit that this was a misconstruction of these contracts.

Under the terms of the first contract, Exhibit “A”, it was to be fully performed on or before June 1st, 1914.

The contract, Exhibit “B”, recites in its second paragraph that its consideration is the making of the first contract, Exhibit “A”.

The timber referred to in both contracts stood

and grew, indiscriminately, upon the same lands. The plaintiff in error was to have four years to remove this mixed timber. The fourth paragraph of Exhibit "B" provided as follows:

"Party of the second part agrees to cut and remove all of said mixed timber on or before four years from the date hereof and to pile the brush resulting from said cutting as the work progresses and to burn said brush each year, the piling and burning said brush to conform to the State Fire Law as enforced by the Fire Warden appointed by the State."

The time of performance and the requirement of the burning of the brush each year under the State Fire Law negative any presumption that the two contracts were to be performed together. The brush could not be burned until the white and yellow pine were removed. However, all doubt upon this subject is removed by a reading of the last paragraph of Exhibit "B", which is as follows:

"First party agrees to fully warrant title and quiet possession to second party against any and all persons lawfully claiming or to claim the whole or any part thereof upon the completion of said contract bearing even date herewith and the payment of fifty-cents per 1000 feet, board measure, and the piling and burning of brush as herein provided."

And it appears, by necessary implication, that in performing his part of the contract, Exhibit "B", the plaintiff in error would require to use the same roads and skidways as he provided under the contract, Exhibit "A". Deprived, as fully appears from the



statement of the second cause of action, in his complaint, of the use and possession of these auxiliaries, he could not carry out his part of the second contract.

Paragraph 3 of the second cause of action recites that the contract, Exhibit "B", was dependent upon and in its carrying out was to follow the completion of the contract, Exhibit "A".

It is respectfully submitted that the judgments, both as to the motion to strike and the demurrer, should be reversed and the cause directed to be proceeded with as required by law.

CHAS. E. MILLER,  
JUSTIN H. WIXOM,  
*Counsel for Plaintiff in Error,*  
Wallace, Idaho.



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NO. 2604

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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RUDOLPH SCHULTZ,

Plaintiff in Error,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant in Error.

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Brief of Defendant in Error

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Upon Writ of Error to the United States District  
Court of the District of Idaho,  
Northern Division

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REESE H. VOORHEES,

Spokane, Washington,

EZRA R. WHITLA,

Coeur d'Alene, Idaho,

Attorneys for Defendant in Error

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Filed

OCT 7 - 1915

E. D. Monckton





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**BRIEF OF RESPONDENT.**

In order that the court may have a clear understanding of the facts in this case we take the liberty of giving a brief history of the case.

This action was originally started in the District Court of the First Judicial District of the State of Idaho, and thereafter removed to the Dis-

trict Court of the United States for the District of Idaho, northern division.

The defendant company moved to strike out a large amount of the matter contained in the plaintiff's two causes of action, and thereafter his honor, Judge Dietrich, sustained the motion as to a large part of the complaint and directed that said matter be stricken out. The defendant thereupon demurred to both causes of action as set forth in plaintiff's complaint. The demurrer was thereafter presented and the Honorable District Judge sustained the same as to both causes of action. The appellant did not see fit to amend his complaint but filed a specific election to stand on the complaint. The election being in the following words:

“The plaintiff above named by Charles E. Miller, his attorney, a demurrer to his complaint herein having been sustained, now here-in elects to stand upon the sufficiency of his said complaint and the count may proceed accordingly.

CHARLES E. MILLER,  
Attorney for Plaintiff,  
Residence and P. O. Address:  
Wallace, Idaho.”

Upon said election having been filed and served the honorable District Judge entered a judgment



dismissing the action. This judgment was entered in November, 1914. No further proceedings whatever were taken by the plaintiff or appellant herein until the 31st day of March, 1915, when a citation in error was served upon the respondent.

No bill of exceptions or other record in the case was ever served upon the respondent, other than a bill of exceptions upon the motion to strike out parts of plaintiff's complain; but no bill of exceptions for the final record in this case has ever been served upon respondent, and at this time respondent does not know what has been included in the record sent up to this court. No printed record has ever been served upon respondent and at the time of preparing this brief respondent does not know what the record will contain, and, therefore, cannot refer to the printed record by page and folio as required by the rules of this court. Subdivision C, para. 2, Rule 24

STATEMENT AND AUTHORITIES ON THE  
ORDER OF THE COURT STRIKING  
OUT PARTS OF THE COM-  
PLAINT.

In the brief which has been served the appellant specifies as error the striking out of certain parts of the complaint by the Hon. Dist. Judge. We do not think that under the conditions of the record this matter can be considered at this time; but if the

court should decide to consider the same we respectfully submit that the ruling of the lower court was correct.

The part alleged in plaintiff's brief to have been stricken out,—which is the only record that has been served upon the respondent setting forth such facts,—being the matters assigned as the first error, we think are not well taken. It matters not whether plaintiff was a millionaire or owned nothing, he contracted with the defendant to perform certain services and his financial ability was not made a part of the written contract. The contract was full and complete in its terms. It should not now be added to or changed by parol and this plaintiff is attempting to do. If the contract was breached by the defendant wrongfully, the plaintiff has a cause of action, whether he be millionaire or pauper, and the allegations in his complaint as to what his assets were or that the defendant knew them are immaterial.

The matters alleged on page ten of the brief as having been stricken from the complaint are also immaterial. It matters not what plaintiff had done, whether he had spent all of his money or whether he still had a million dollars. This would not give rise to any cause of action nor be any part of a cause of action. This is also true of the second matter set

forth on that page of the brief, because if, as before stated, the contract was breached by defendant wrongfully, a cause of action arose and it made no difference whether plaintiff had exhausted all of his resources or not, because if he had a right of action the right of action accrued to him regardless of what he had left or what he had spent.

The case of Skagit Railway and Lumber Co. vs. Cole, 2 Wash. 57, cited by council is not in point, as it will be noticed by a reading of that case that it specifically states that the party bringing the action had no moneys to carry on the contract with, and that defendant specifically understood and agreed to furnish plaintiff the reasonable market price of all provisions and logging supplies needed by him to carry on the work under the provisions of the contract, and it was because of the refusal to comply with this provision of the contract that plaintiff claimed a right to maintain the action. Here there is no such a contract as this, neither is there any allegation that defendant made any agreement to do any such act, then, therefore, it is no part of the cause of action. In the case cited by counsel it was the breach of this covenant of the contract which gave rise to the cause of action, while here the alleged breach does not consist in any of the things stricken out whatever, and therefore they are en-

tirely immaterial. If the complaint states a cause of action at all it states it without these matters being therein. If it does not state a cause of action without these, their addition does not assist it in so doing. This was the view taken by the learned District Judge and we submit it is correct.

### STATEMENT OF FACTS.

In order that the court may understand the facts in this case it is in reality but necessary to read the written contract upon which the causes of action are based. Plaintiff in his complaint has pleaded considerable but the real cause of action is exhibits A and B, and the only matters alleged in plaintiff's complaint which are at all material are those allegations in which he alleges, or attempts to allege, a breach of the contract by the respondent.

In Exhibit A the appellant contracts with the respondent to remove certain timber located on the land belonging to respondent in Shoshone County, Idaho. This contract provides, among other things, the following:

“That said logs shall be scaled with a Scribner Decimal A Rule by a scaler to be mutually agreed upon by the parties hereto, each to pay one-half of said scaler's wages, the party of the first part to board said scaler at his expense. \* \* \* That the party of the first



part agrees to furnish receipts for all of the labor performed on the above mentioned logs, or satisfactory evidence that said labor has been fully paid; also receipts for payments of all supplies used in logging the timber, or satisfactory evidence that said supplies have been fully paid."

That part of the contract which provides for the time of payment, and which is the essential point involved in this appeal is as follows:

"In consideration of the stipulations herein to be fully performed by the party of the first part, the party of the second part agree to pay to said party of the first part on the 15th day of each month three and 25-100 dollars per M foot, board measure, for all said white pine and yellow pine logs which shall have been placed on skids by the party of the first part during the proceeding calendar month, *providing, however,* that the party of the first part shall have roads made from said skidways to the banking ground on Pine Creek without additional expense, excepting for hauling and Two and 25-100 Dollars per M. feet, board measure, on the 15th day of each month for all said white pine and yellow pine logs which shall have been hauled and floated in Pine Creek by the party of the first part

during the preceding calendar month and the balance of \$1.00 per M. feet board measure on the 15th day of each month, for all said white pine and yellow pine logs delivered in the Main Fork (North) of Coeur d'Alene River during the preceding calendar month."

These are the provisions of the contract upon which the first cause of action is based. The two contracts will be presented separately as they have in reality no connection.

The demurrer filed by the respondent calls special attention to the insufficiency of the complaint and was a special demurrer. Subdivision 3 of paragraph one of the demurrer being to the effect that the complaint did not show that the compensation was due for the reason that the plaintiff had not alleged, stated or shown that he had built the right of way over which to haul the logs to Pine Creek, as provided for in the contract.

As it was upon this particular point that his honor, Judge Dietrich, sustained the demurrer to this cause of action we will present it first.

The other grounds of demurrer were to the effect that the logs were to be sealed by a scaler to be mutually agreed upon, and that until this was done the plaintiff was not entitled to compensation. The plaintiff was to furnish receipts for all supplies

used in logging the land before he was entitled to the money. Paragraph two of the demurrer was upon the ground that plaintiff had failed to allege that he had secured the logging right of way or road to haul the logs over, or that the road had been built so that the logs could be hauled to Pine Creek. Subdivision 2 of paragraph one was as to certain elements of damage claimed; and subdivision "c" of paragraph two was that there were two causes of action improperly united in one complaint.

### ARGUMENT AND AUTHORITIES.

Counsel in his brief filed herein has discussed many things which are, in our opinion, immaterial to the issues presented.

Commencing on pages 16 of his brief and continuing down thru all the matter of damages seems to us to be entirely out of place in view of the grounds upon which the demurrer was sustained; and upon this question it seems to us to be out of place to attempt to submit authorities.

Rule 10 of the District Court of Idaho provides, among other things:

"In actions at law the pleadings shall be in accordance with the laws of the state as the same shall exist at the time in question."

In Idaho there is no such thing as a motion to make a complaint more definite and certain, but

this is reached by special demurrer.

“Any ambiguity or uncertainty therein could *only* be reached by special demurrer alleging such grounds and pointing out the defect specifically.”

*Naylor v. Vermont Loan & Trust Co.*, 6 Ida.  
251;

*Yornie v. Blackfoot Land & Water Co.*, 15  
Ida. 56.

The demurrer in the case at bar is special and points out the ambiguities and uncertainties complained of in detail.

Taking up the demurrer, first upon the ground sustained by the honorable District Judge, we desire to call particular attention to a part of the honorable District Judge's statement in the memorandum decision sustaining the demurrer. In this his honor said as follows:

“ \* \* \* it is provided that the first payment shall be made to the plaintiff at a certain time, in case that at such time the plaintiff shall have built roads from the skidways to the banking ground on Pine Creek so that the logs can be hauled to Pine Creek without additional expense. Under a fair construction of the contract the building of these roads is a condition precedent to the maturity of the obligation to



make the first payment. It is possible that the plaintiff intended to plead the construction of these roads, but there is no direct allegation to that effect and there is no reasonable inference. It is alleged that he, the plaintiff, spent certain moneys for that purpose, but that fact alone does not imply the completion of the road. I think if it be a fact that the road is completed there should be inserted a positive statement to the effect that this provision of the contract has been complied with. This insertion may be made by interlineation, if the plaintiff so desires.”

It will thus be seen that the court held in sustaining the demurrer that if plaintiff had complied with his contract all that it would be necessary for him to do would be to make a short interlineation alleging that fact, but plaintiff refused to make this amendment. The only fair inference from the plaintiff's action is that he could not make such an allegation for the reason that he had not performed this part of the contract. In other words, it is practically an admission that plaintiff *had not built the road from the skidways to the banking ground on Pine Creek so that logs could be hauled to Pine Creek without additional expense.*

In order that the court may understand this part of the contract, it should be viewed in the light of circumstances surrounding logging operations in North Idaho, with which his honor, Judge Dietrich, was familiar, and which knowledge he used in passing upon this question. These logs were to be cut several miles from the river in which they were to be floated out to market. The defendant had no right of way from its lands where the logs were being cut to this river. In letting the contract it was explicitly provided that plaintiff should secure this right of way and build these roads so that logs when cut could be readily brought to market. Without this right of way and road having been obtained and the road built the logs would be valueless when cut, as there would be no way to bring them to market; and in order that they might not be cut and left on the skids to waste the defendant explicitly provided that the money, which was to be due when the logs were put on the skids, should be paid *provided* the road was built so that the logs could be hauled out without additional expense, because if the right of way was obtained and the road built and plaintiff for any reason failed to bring the logs out of woods, then the defendant would have an opportunity to secure the services of others to put the logs in and thereby save its property from loss, but if the right

of way was not obtained and the road built the defendant would then be at the mercy of every one over whose land the right of way would have to be secured in order to take its logs to market.

It was unquestionably the intention of the parties that the right of way should be obtained and the road built before any money whatever became due to the plaintiff and therefore as held by his honor Judge Deitrich, the maturity of the obligation depended upon the securing of the right of way and building the road. And as plaintiff had not alleged these facts, under a special demurrer, the complaint did not state sufficient facts to show the maturity of the obligation sued on, and in view of the fact that the court authorized an amendment by interlineation, it is only fair to assume that this road was never built, and therefore that the right to this money never matured, because had it been otherwise the plaintiff would have amended by a short interlineation and saved the expense of this appeal.

is to become due provided a certain act has been performed, that it is then incumbent upon the party claiming the money to be due under the contract to allege specifically that the thing which matures the obligation, that is, the act which the contract speci-

Briefly stated, our position is that where money

fied should be done to entitle the party to payment. had been performed.

The money was to be paid at a certain time *provided* roads had been made so that the logs could be hauled without any additional expense, excepting for the hauling charge alone. It is our contention that the very explicit conditions of this contract settling the maturity of this obligation on the 15th of each month was conditional upon the roads having been built. In other words, the money was not due on the 15th of the month unless the roads were built. We take it that the word "provided" makes a condition the performance of which must be alleged before the complaint shows a maturity of the obligation of the right to claim the benefit of the condition

"We think the term "provided", as here used, must be construed as a condition, for such is clearly the intention of the parties. "Provided" is defined by Webster as: "On condition; by stipulation." Mr. Bouvier, in his Law Dictionary, says: "A proviso always implies a condition, unless subsequent words change it to a covenant." Mr. Anderson, in his Dictionary of Law, says of "provide": "No word better expresses a condition, and it is always so taken, unless the context shows that the intent was to create a covenant."



*Ormsby v. Phenix Ins. Co.*, 58 N. W. 301-303;

*DeWitt vs. Kaufman County*, 66 S. W. 224.

The Circuit Court of the Fourth District in passing upon this question said as follows:

“When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and, in all cases where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and, in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded rather than the technical sense of the word used.”

*Huggins v. Daley*, 77 Fed. 606, p. 610.

We think this case aptly applies here, because the thing to be done by the appellant in this case before he was entitled to payment was, not only to skid the logs, but to have roads made from the skidways

to the banking grounds so that the logs could be hauled without additional expense; and his right to compensation was dependent upon having this work and labor performed, his act was a condition precedent to being entitled to any money whatever, and was to be performed in the order of time specified in the contract namely, he was to have the work done before being entitled to any money whatever. And we respectfully submit that by reason thereof, and the failure of complainant to allege anything which even intimates that he has performed this condition, there is nothing to show the money ever became due.

The other grounds of the demurrer are simply that Exhibit A, which is attached to the complaint and made a part of it, shows that certain measurements were to be made by a third party as a condition precedent to the right of recovery. For instance the contract explicitly provides: "that the logs shall be scaled with a Scribner dec'l A Rule by a scaler to be mutually agreed upon by the parties hereto." In other words, here it is agreed that a certain person, or persons, to be elected by the parties, shall measure the logs or set the amount for which compensation is to be paid, and it is a condition precedent to the party's right of recovery that such party shall have made the estimate. And before the party is entitled to compensation for do-

ing the work the scaler must have been agreed upon between the parties, or else the party seeking the compensation must make some allegation as to why this was not done, or show that through no fault of his this neglect occurred, because surely the Stack-Gibbs Lumber Company cannot be held or required to pay for logs until they are sealed in the manner provided by the contract; and this being a condition precedent to the plaintiff's right to compensation, he states no cause of action until he alleges and shows that these logs were sealed as provided in the contract, or shows some reason why the same was not done.

“So if the contract is to be performed to the satisfaction of a third person, as where the certificate of an engineer or architect is required or the price to be paid is dependent upon his decision as to the quantity, quality, or price of materials, or the quality of workmanship, it must be alleged that the person designated has performed the stipulated condition, *since until this is done or its performance excused the plaintiff has no right of action*. And if the plaintiff fails to allege performance of the condition in declaring on the contract he must be nonsuited on the ground of variance, the contract alleged being absolute, while that proved is conditional.

So if the contract is truly stated, but the averment of a performance of the condition is omitted, the pleading will be held bad on demurrer or in arrest of judgment as showing no cause of action, or the plaintiff will be nonsuited because his evidence shows no right of action. And a certificate given after the commencement of the action comes too late to save the plaintiff's case."

9 *Cyc.* 700 para. b.

"If the plaintiff's right of action depends upon a condition precedent, he must allege and prove the fulfillment of the condition or a legal excuse for its nonfulfillment. And if he omits such allegation, his declaration, complaint or petition will be bad on demurrer."

9 *Cyc.* 699.

The plaintiff states that he has alleged that "the logs in payment for which the defendant had defaulted had been scaled as required by the contract." If we take him at his word he is stating no cause of action, but has only stated a conclusion of law. His allegation that "the logs have been scaled as required by said contract", is not a statement of any fact but a statement as to a conclusion of law and presents no issuable fact in this case. Suppose defendant should deny that the logs have been scaled as re-



quired by the contract, the court then would have no issuable fact before it. It would simply have a legal conclusion as to the requirements of the contract and would have no statement of facts as to what had actually been done.

Counsel has not cited a single authority in opposition to those cited by the defendant to the effect that where work is to be measured by a third person, and the money is to be paid by the rate of compensation fixed by a third person, that it must be shown that such adjustment has been made, or the measure of compensation ascertained by such third person before a cause of action arises, and without this being alleged the complaint is certainly defective.

“That an obligation to pay money may be dependent upon the action of a third person, over whom neither party has any control and that payment cannot be exacted unless the specified act is performed is familiar law.”

9 *Cyc* 700.

“It was alleged that the work had been completed and the contract fully performed on their part, but there was no allegation in regard to the estimate by the engineer. The defendant demurred for insufficiency and the demurrer was overruled. Held that these two counts were

bad because of the omission in respect to an estimate as provided by the contract.”

*Loup et al v. California So. Ry. Co.*, 63 Cal.

97. In the opinion the court says:

“In *Smith v. Briggs*, 3 Denio, 73, defendant had covenanted to pay the plaintiff for doing the carpenter work of certain houses, when he should receive from the architect his certificate that the work was fully and completely finished according to the specifications annexed to the contract, and it was held that the giving of the certificate by the architect was a condition precedent, the performance of which must be averred in the declaration in an action to recover payment of the work. *Morgan v. Birnie*, 9 Bing. 672, is the same effect; and this court in *Holmes v. Richet*, 56 Cal. 307; affirmed the same doctrine. “If,” says Mr. Justice Bramwell, in *Elliot v. Royal Ex. Assurance Co.*, L. R. 2, Ex. 245, “the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third party has so assessed the sum, for to say the contrary would be to give the party a different measure if rate of compensa-

tion from that for which he bargained." "And," says the Supreme Court of Vermont, in *Herrick vs. Belknap*, 27 Vt. 673, "If payment for the work performed is dependent upon, and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, etc., the obligation to pay will not arise until such estimates are made, unless no estimates have been made through the neglect or fault of the engineer or of the party who employs him."

"These cases establish the proposition that the action in hand was according to the allegations of the complaint, prematurely brought, and the demurrer to the complaint ought to have been sustained."

*Loup et al v. California So. Ry Co. supra.*

It is exactly the same here. There is no allegation regarding the scaling of these logs and until that was done the amount of compensation to be paid the plaintiff was never ascertained, and it was to be ascertained in the way provided by the contract, namely, the estimates of the scaler agreed upon, and until plaintiff alleges that that has been done he has not alleged a cause of action.

The same question was also involved in the case

of McNamara et al v. Harrison et al, 46 N. W. 973, in the Supreme Court of Iowa and citing the case above referred to and other cases the court said:

“Until it is shown that the chief engineer has made the required certificate or there is some good reason shown why it has not been furnished, no action can be maintained.”

“Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party who seeks enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect.”

*United States v. Robeson*, 9 Peters, 319, 9  
Law Ed. 142.

A large number of authorities are collected in Holmes vs. Richet, 56 Cal. 307, beginning on page 312 of the opinion the court, among other things, says as follows:

“In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract?”

The court, after having asked the question, then determines it in the affirmative. We think no authorities can be found holding other than this and



until a proper case is made out by the plaintiff so that the parties upon the trial will know exactly what to meet and what witnesses to prepare for at the trial, it is impossible for them to properly present their defense.

We think there can be no question but what it was the intention of the parties in this contract that before either the plaintiff was entitled to any money or the defendant was to be compelled to pay therefor, that the logs were to be scaled by some scaler mutually agreed upon between them, and the complaint is silent as to the alleging that any such scaler was agreed upon or anything which would excuse the omission of scaling of these logs by such scaler on the part of the plaintiff; and until such allegation is made, or some showing made as to why this condition was not performed, the plaintiff was not entitled to any compensation under the contract.

The second ground of the first paragraph of the demurrer is as follows:

“That it appears from said contract, “Exhibit A”, attached to and made a part of said first cause of action, that said plaintiff was to furnish receipts for all labor performed on the above logs or satisfactory evidence that all labor had been fully paid, and also receipts for payment of all supplies used in the logging of .

said timber, or satisfactory evidence that the same had been fully paid for, and it appears from said contract that the same had been fully paid for, and it appears from said contract that the furnishing of such receipts or satisfactory evidence was a condition precedent to the right of compensation by said plaintiff, and said complaint does not allege, state or show that such labor or supplies were paid for by the plaintiff prior to said time or that such receipts or evidence was furnished to the defendant."

The contract itself provides as follows:

"That the party of the first part shall furnish receipts for all labor performed on the above logs or satisfactory evidence that said labor has been fully paid, also receipts for payment of all supplies used in logging off the above mentioned timber or satisfactory evidence that said supplies should be fully paid; that said party of the first part shall fully perform their part of this contract and cut into said logs, skid, haul, float and drive all said white pine and yellow pine timber and deliver same in the main north fork of the Coeur d'Alene River on or before June 1, 1914, except should the work of getting the white and yellow pine logs out by the party of the first part be delayed from cause:

unavoidable that the time be extended by mutual consent of the parties hereto.”

It is clear from a reading of the contract that it was the intention of the parties that at the time plaintiff should demand payment for any money due him for logs that he should furnish defendant with receipts for the payment of labor and supplies. The court in construing this contract will, of course, construe it in the light of the situation of the parties and the reason for this provision being placed in the contract. The reason for placing this provision in the contract was undoubtedly to protect the defendant in making payment so that whenever plaintiff should be entitled to any money defendant would have evidence that no liability was outstanding for which its logs would be taken by mechanics' or labors' liens. This also applies to the supplies, as at the time this contract was made the supply lien law of the state of Idaho was still in force and effect and the decisions of the Supreme Court of this state nullifying that law, as was done in the cases of Anderson against Great Northern Railway Company, 25 Ida., 433, and Donovan, etc., vs. Tri State Cedar Company, 25 Ida. 462, had not yet been rendered. It is plain upon the face of this contract that the defendant lumber company desired this evidence of payment at the time it made the various remittances

so that plaintiff could not receive the full amount due him for work under the contract and at the same time allow his labor and supply bills to go unpaid, which would become a lien upon the saw logs and defendant's property taken from him and it be compelled to make double payment therefor. And while the contract may not be exactly definite as to when this evidence was to be furnished viewed from the situation of the parties and the light of the contract and conditions generally surrounding logging operations, it shows clearly that it was intended that these receipts be furnished for the work and labor performed up to the time the payments became due in order that the lumber company might protect itself against laborers and supply liens, as otherwise, it would have to pay the contractor the full amount due him under the contract at the same time the logs would be responsible for all labor performed and all supplies furnished to that date, which would be no safeguard to it at all. The authorities before cited on the question of pleading a condition precedent we think equally apply to his, and that before plaintiff is entitled to a cause of action against the defendant he should be required to show that he has done and performed those things which entitle him to compensation under the contract.

Paragraph two of the demurrer is to the effect



that the complaint is ambiguous, unintelligible and uncertain. Subdivision “a” of paragraph two is as follows:

“That it alleges in paragraph six that said contract provided and required plaintiff to furnish all right of way over which to haul logs to be cut from the land at his own expense and also alleges that plaintiff had expended for right of way the sum of \$200.00 and more than \$1100.00 for building and constructing such road and to fit the same for the purpose of hauling the logs to water, but does not allege, state or show that plaintiff had secured or had any legal contract for the right of way or use of the road or an easement for hauling logs across the land from the place of the skidding of said logs to the place where they were to be delivered in Pine Creek, or that such road had been built its entire distance sufficient or proper over which to haul said logs.”

We think that when the parties entered into a contract providing explicitly that the party of the first part should secure a right of way over which to haul the logs, as is provided in the contract attached to the complaint in this case, that this meant that he should secure a legal right to do this,—one|

which he could enforce,—one that would protect the defendant so that in paying to the plaintiff money for the logs which had been cut and skidded the defendant would know that plaintiff would have an absolute right to haul those logs over the road in getting them out and delivering the same to it in the creek. It certainly cannot be contended that plaintiff could go to every individual who owned land between the place where the logging operations were and Pine Creek and ask permission to cross his land, and without securing anything more than a verbal permission, revocable at will, compel defendant to make payment of the full amount of money due under the contract. This would not be in accordance with the intention of the parties, and to construe the contract in this way would do violence to its intention, as it is plain upon the face of the contract that defendant was to be protected in the payment which it was to make by knowing that this right of way had been secured, and legally secured, so that when it paid for the logs being cut and placed upon the skids it knew plaintiff would have the legal right of way to haul them from the skids to the banking grounds; and, as the complaint does not state or show that they ever secured any legal contract therefor, the court will not presume that any legal contract has been secured for the right of way, but will require

plaintiff to plead and show such fact. Neither does the complaint allege, state or show that this road had been built its entire distance, and under the explicit wording of the contract it was necessary that this be done before any payments should be made by defendant. And the defendant in this case is at a loss to know whether the plaintiff is claiming that he did have a legal contract for the right of way; whether he is going to try to claim that he built the road its entire distance, or what his claim will be upon the trial of the case; and we think we should, and do, have a right to require plaintiff to allege this so that we will know upon the trial of the case what evidence to produce in order to meet plaintiff's contention. If this is not explicitly alleged it would require us to have a large number of witnesses present in order to meet the contentions that plaintiff may not urge and set forth when the case is tried, and would incur a large amount of expense to both parties needlessly, simply because of the ambiguity and uncertainty of the complaint.

Subdivision "b" of paragraph two goes rather to the pleading of special damages. The plaintiff is seeking in this case to recover for all profit which he claims he would have made had he been allowed to fulfill this contract. He is also asking to recover all of the expenses which he has paid out. If he is

entitled to recover at all, only the loss which was actually occasioned because of the breach of the contract would be all that he would be entitled to. In other words, if the building of the roads and cutting of the timber cost him \$3.00 per thousand, and he was to receive \$3.25 per thousand for cutting and skidding, then his measure of damages would be but twenty-five cents per thousand, and certainly he cannot collect that twenty-five cents per thousand and at the same time the money which he has expended for building roads, labor employed and expense incurred in making that profit. To do so would be to entitle him to recover more than he could have secured had he performed the contract and would be requiring defendant to pay him his prospective profits as well as his expenses, which he is certainly not entitled to.

Subdivision "c" of paragraph two of the complaint is the objection that two causes of action are improperly commingled and united in one count, the demurrer being as follows:

"That in said first cause of action two causes of action are improperly commingled and united in one, to-wit: A cause of action for damages for alleged profits claimed to be recoverable because of breach of contract, and also an alleged cause of action for moneys ex-



pended as such damages in buying and building roads which cannot be recovered in the same cause of action with the alleged profit, for the reason that it creates in the same cause of action a different element of liability for damages to which the plaintiff is not entitled.”

It seems to us clear that the two elements of damage stated in the first cause of action cannot be commingled, because if plaintiff is entitled to recover his profit, then he would be made whole because of any damage sustained. But if at the same time he should also be entitled to recover special damages, such as expenses laid out in attempting to perform the contract and for such work as building roads, he would be recovering damages and imposing a double liability upon the defendant for a breach of the contract, which is unquestionably not permitted by any form of pleading nor any form of action, as only the actual damages suffered by the party is all that he can recover; and the building of the road would not be a special element of damage any more than the loss of time, which would be wholly consumed in the performance of the contract. Upon this we think any argument or citation of authorities would be out of place.

There are, we admit, also two causes of action improperly united in the claim the plaintiff set and

skidded logs for which, at the contract price, he was entitled to be paid the sum of \$821.50 on the 15th of the month, which sum he was not paid; and in the further claim that the defendant repudiated the contract and prevented the plaintiff from fully performing the same by reason of which plaintiff lost the profits he would have made if he had not been prevented by the defendant from getting ahead, and also the sums of money which he had expended. These two claims, however, growing out of the same contract, are distinct and separate, and either could be sued upon alone and clearly constitute two separate causes of action. The foundation for the claim for profits is that the defendant repudiated the *whole* contract and *prevented* plaintiff from further performing, while the other cause of action is for work and service actually rendered by the plaintiff at the contract price. These two causes of action should have been separately stated.

But there lies in the claim and cause of action for profits, because the plaintiff was prevented from fully performing the contract, a more serious and vital defect than mere improper joinder. The claim for profits and for the moneys expended shown in paragraph VIII of plaintiff's complaint, does not contain facts sufficient to constitute a cause of action, however clearly intended to be such. If the

allegations that the plaintiff was “prevented” by the defendant and that the defendant “repudiated” the contract, stood alone in the pleading as against a demurrer, they might be sufficient though they are obviously mere conclusions, but they do not stand alone, the plaintiff explaining that the “prevention” and “repudiation” relied upon consist in the failure of the defendant to make the payment for the logs which the plaintiff had actually cut and skidded, and which was due on the 15th of the month. The contract is a divisible contract, the work done in each month standing by itself and to be paid for on a fixed date at a fixed rate by itself. The written contract on which the action is founded does not provide that the payment of each installment by the defendant is a condition precedent to the plaintiff being required to further perform his contract. The failure to make such payment is the only act charged against the defendant as “prevention” or “repudiation.” It is only when the plaintiff is actually prevented from performing the balance of the contract that he is entitled to consider it as terminated and to sue for what he would have made upon it if he had been permitted to carry out his part of it. Under these conditions, on the face of the complaint and on the face of the written contract, the cause of action for damages and the amounts expended by

reason of "prevention" by the defendant cannot be sustained.

*Palmer & Robertson v. O. M. R. R. Co.*, 18 Ill. 217;

*County of Christian v. Oberholt*, 18 Ill. 223;

*Kinney v. Sherman*, 2E Ill. 520

The reasoning is so complete and convincing in the opinion of *Palmer & Robertson v. O. M. R. R. Co.*, supra, that it is unnecessary for us to elaborately argue the point in this brief. In this case the court said:

"I have examined all the authorities referred to by counsel and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract; as where he refused to furnish a place wherein to erect a building or to furnish material which by the contract, was to be put in the works and which was to be provided, was to be put in the works and which was to be provided by him. \* \* \* But no where



have I found a case where the failure to pay the consideration for the work as it progresses, according to the terms of the agreement, has been held such an act of omission on the part of the defendant as to prevent the other party from completing the contract. It is undoubtedly true that the failure to make such payments may in point of fact leave the other party without the means of credit to go on and complete the job, but such is not the necessary result of such a failure, and we cannot safely adopt it as a conclusion of law that it does prevent the party from going on. \* \* \* The contract undoubtedly may be so drawn as to make the payment of a part of the consideration by installments as the work progresses, or at stated times independently of the progress of the work, a condition precedent to the further prosecution of the work and make its non-payment such a substantial violation of the contract as to authorize the other party to abandon the work and sue upon it, as for having been prevented from completing it by the act of the party who had thus failed to perform such condition precedent. But the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time or upon the comple-

tion of a specified part of the work. In order to give a contract such an effect it should contain some provision showing that it was the intention of the parties that the nonpayment of the money as stipulated should produce such a result upon their rights. \* \* \* But such intention must be found in the expressions used in the contract, and is not to be guessed at as being probable from the extent or magnitude of the contract, when there are no expressions in the contract, when there are no expressions in the contract evincing such intention, which would be required to authorize such construction were the subject matter of the contract less important or the amount of the payments withheld more insignificant.”

*Palmer & Robertson v. O. M. R. R. Co., supra*

We respectfully and earnestly submit that the honorable District Judge did not err in sustaining the demurrer to the complaint but that his ruling was correct and that as shown by the procedure in this case, the plaintiff tacitly admitted his inability to plead those facts which are essential to make a cause of action; that the Honorable District Judge was correct in dismissing this action, especially in view of the fact that the plaintiff filed and served written notice of his refusal to plead any further,

seeking rather to appeal and try and establish his right of action in this court rather than to amend and set forth these essentials, showing thereby that his cause of action was based upon a technical rather than upon a meritorious cause; and as the demurrer in this case was a special demurrer on the grounds of the uncertainty of the complaint, and,—we think the grounds of uncertainty cannot be denied,—the demurrer was unquestionably good, and we respectfully pray an affirmance of the judgment as to the first cause of action.

#### DEMURRER TO SECOND CAUSE OF ACTION.

The second cause of action is likewise based upon a written contract, which is a contract for the direct sale of property.

Counsel in his brief on page 27 has stated that the two contracts set up in the two causes of action were interdependent, and that the consideration for the making of the contract “B” was the making of contract “A”.

Of course it is an elementary rule that it is the promise and not the fulfillment thereof that is the consideration of a contract, and as the party had already contracted and promised to do certain work that was sufficient to make the other contract abso-

lutely binding, and plaintiff can yet complete exhibit B.

“In contracts containing executory considerations or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent of the performance of the other.”

9 *Cyc.* 642 b.

Counsel has attempted by making a number of allegations to allege a cause of action and to state that the contract was different from what it explicitly provides in its terms; but we submit that as the written instrument itself is made a part of the complaint and is complete in its terms, that it must be taken as the basis of the cause of action, notwithstanding the fact that plaintiff has alleged it otherwise.

Counsel on page 28 of his brief calls attention to the fact that the contract provides that plaintiff shall burn the brush in the timber which he cuts, and says that this is conclusive that this contract was dependent upon Exhibit A. This is nothing but a provision in the contract that the appellant will perform the duty imposed upon him by law and was



placed in this instrument for the purpose of relieving the Stack-Gibbs Lumber company from any liability if the appellant failed to perform the duty enjoined upon him by the statutes of the state. Subdivision 30, Section 1605 of the Revised Codes of the State of Idaho as amended in 1909, found in the 10th Session Laws of the State of Idaho, on page 229, provides, among other things, as follows:

“Sec. 1605. \* \* \* Sec. 3. Any person firm, or corporation engaged in the cutting and removing of timber, logs, ties, telegraph poles, wood or other forest products from lands within the State of Idaho, shall pile and burn or otherwise dispose of the brush, limbs, tops and other waste material incident to such cutting, which are four inches or under in diameter, and the times and methods of so doing shall be prescribed by the warden of the fire district in which said cutting shall be done.”

The law then imposes a penalty for failing to do so, and the respondent company was simply contracting that appellant should do this work to relieve itself of any responsibility therefor.

The other provisions called attention to by appellant we submit have no bearing upon the question and is undoubtedly meaningless, as the title to the timber became vested in the appellant upon paying

fifty cents stumpage therefor, and he had a right to remove it therefor, and any warrant of title or quiet possession to him thereof has no bearing upon this case.

His Honor, Judge Dietrich, in passing upon this cause of action in the memorandum decision, said:

“Coming now to the second cause of action. I do not think that sufficient facts are stated to entitle the plaintiff to recover under this cause of action. The two contracts are inter-related, but it is clear that the defendant has not directly breached the second contract, and if there has been any violation of it at all it is by reason of its necessary connection with the other contract. So far as appears, the plaintiff could have at any time done, and could yet do, the work authorized by the second contract. He has not been interfered with, unless the interference with his performance of the first contract necessarily acts as an interference with his performance of the second. It is possible that the two jobs are so inter-dependent that one cannot be performed without also performing the other, but the court cannot presume that such is the case. If it is from a business standpoint impracticable to lumber the classes of timber referred to in the second contract without also

lumbering the classes referred to in the first contract, that fact should be made to appear. If such is not the fact, it is difficult to see how the plaintiff has in any way been prevented from performing the second agreement.”

Under this holding his honor sustained the demurrer to the second cause of action.

The grounds of the demurrer to the second cause of action can be grouped under two principal heads:

1st. There is no allegation of a breach of the second contract;

2nd. This second contract is full and complete within itself, setting forth all of the terms thereof, and the pleading in this case is an attempt to interject into the written contract terms which are not therein, namely, that this contract was dependent upon the completion of the contract Ex. A, which the contract shows is not the fact, and is, therefore, an attempt to vary and change a written contract by parol.

Under the first cause we submit this: That Exhibit B, as set out in the complaint, is a complete contract for the sale by the defendant to the plaintiff of certain white fir, red fir, tamarack, spruce, bull pine and cedar timber upon certain land. The consideration for the sale of this timber was to be fifty cents per thousand feet, board measure, which

was to be paid on the 10th of the month for all timber cut the preceding month. This contract was dated October 15, 1912, and has four years in which to run. If the plaintiff desires to cut this lumber at the present time he can do so upon making payment therefor as provided in this contract. This contract Exhibit B, can be performed by the plaintiff whether the other contract has been breached by either party or not, as there is no provision in this contract providing that it shall become null or void in case either party does not fulfill the contract upon which the first cause of action is based. Until there is a breach of the contract any action brought cannot be maintained, and the plaintiff in his second cause of action sets forth no breach of the contract whatever, and under the explicit terms of the contract itself he has four years in which to remove the timber, which time has not yet elapsed.

Further than that, if the plaintiff was prevented from completing the contract set forth in the first cause of action by reason of the fault or neglect of the defendant this would not excuse the defendant from delivering to the plaintiff the timber mentioned in the contract set forth in the second cause of action. In other words, even if defendant had been guilty of a breach of the contract for logging this land this would not then abrogate the contract set



forth as Exhibit B, but would give plaintiff just as much right to continue to cut that timber as if it had been completed; and until defendant refuses to allow plaintiff to cut this timber, which he has purchased under the terms of contract Exhibit B, he has no right of action against the defendant thereunder. Further than that the terms of this contract are explicit, but notwithstanding this, in order to try to make out a cause of action plaintiff has attempted to inject into his complaint facts to show that he depended upon the money which he was to receive from the first contract to make the payments under the second contract.

There is much included in the second cause of action which is wholly immaterial. For instance in paragraph one of the second cause of action he refers to and adopts paragraph three of the first cause of action, almost the entire part of which is absolutely immaterial in the second cause of action. In paragraph three of the second cause of action he refers to and adopts paragraphs four, five, six, and seven of the first cause of action, and paragraph four has no connection whatever with the second cause of action. Five has no connection with the second cause of action, and that part of six which has not been stricken out is wholly immaterial to the second cause of action. Seven has been stricken out

entirely, leaving nothing in these paragraphs which can or does add to in any manner the cause of action set forth in paragraph two, excepting that plaintiff did not secure from the Stack-Gibbs Lumber Company any money with which he claims to be entitled to under the former contract, and as we contend under the first cause of action that here is nothing owing and that he is entitled to no money thereunder, this has no effect.

It is evident from a reading of the entire complaint that it is the intention of the plaintiff to charge that he had to depend entirely upon the money which he was going to make out of the contract "Ex. A" in order to purchase the timber specified in the contract marked "Exhibit B". However much the plaintiff would desire to inject this into the pleading, there is the very elementary rule that where a contract provides for payments to be made the party cannot add to or change the terms of a written agreement by setting up these payments were to be made out of any particular fund or in a particular manner.

"A contract of sale is also conclusive as to time, mode and terms of payment and cannot be varied or contradicted as to these things by parol."

17 *Cyc.* 610.

“We are of the opinion that the answer states no defense. The oral agreement set up in the answer was made at the same time of the notes. It would contradict or vary the terms of the written contract expressed in the notes, change their time of payment, and make them payable out of a special fund. For this purpose it is incompetent and therefore no defense to an action on the notes.”

Singer Manufacturing Co. vs. Potts 61 N. W. 23. This was a case in which the defendant attempted to allege that the notes which they had given were to be paid out of a certain fund, but the court held it was no defense whatever.

*Ware vs. Cowells*, 60 Am. Dec. 482.

“It is no ambiguity in the writing, and there can be no resort to parol evidence to ascertain the meaning of the parties, or the sense in which the words of the agreement were intended, but they must be construed according to the context and the usage of the language. There is nothing either in the context or in the intention of the parties, as shown upon the face of the instrument, indicating that the words were not used in their ordinary sense.”

*Hunt vs. Gray*, 41 N. W. 14, in which the parties attempted to show that payment was to be made dif-

ferent than that expressed in the written agreement, but the court refused to allow same to be done.

*Walker vs. Mack*, 89 N. W. 338.

“Where a written agreement for the sale of an interest in an hotel, and the joint operation of the hotel, provides, without ambiguity, for the payment of a certain sum in a certain time for the interest so sold it is not competent to show by parol that it was understood the payment was to be made out of the profits of the business or in any other manner not specified in the writing.”

*Smith vs. Kemp*, 52 N. W. 639, citing several cases in support of this contention.

This case is very applicable to the case at bar, as here the plaintiff in order to make out an action is attempting to plead and show that he was to make the payments for the timber which he purchased from the defendant out of the profit which he was to make from the logging contract, whereas the contract of purchase is entirely silent upon this point, and it is therefore changing and varying the terms of a written agreement to hold that it was to be paid.

As to the second cause of action we respectfully submit that the contract is one of bargain and sales for certain timber which has four years from the date thereof to run, and no breach of this contract is



shown. And we respectfully submit that the whole cause of action pretended to be set forth in the second count is an attempt by the plaintiff to vary and change the terms of a written contract by attempting to establish that the payments for the timber mentioned in the second contract were to be made out of certain funds which he was to receive and which he might have as a profit on another contract, and which not only vary and change the terms of the written contract itself, but is a contingency based upon a contingency wholly remote and speculative as to whether or not he ever could have made any profit, and if he had made any profit whether or not he would have invested it in this timber and acquired the title, and is but a remote possibility and not a probability, and is not sufficient to base any element of damage thereon.

We respectfully submit to this honorable court that the honorable District Judge was right in his ruling and that the judgment of the lower court in dismissing this action should be affirmed.

Respectfully submitted,

*Ezra H. Whittle*

Residence and P. O. Address:  
Coeur d'Alene, Idaho.

*Reese H. Voorhees*

Residence and P. O. Address:  
Spokane, Washington;  
Attorneys for Respondent.



No. **2607**

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

JOSEPH B. BISTLINE,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

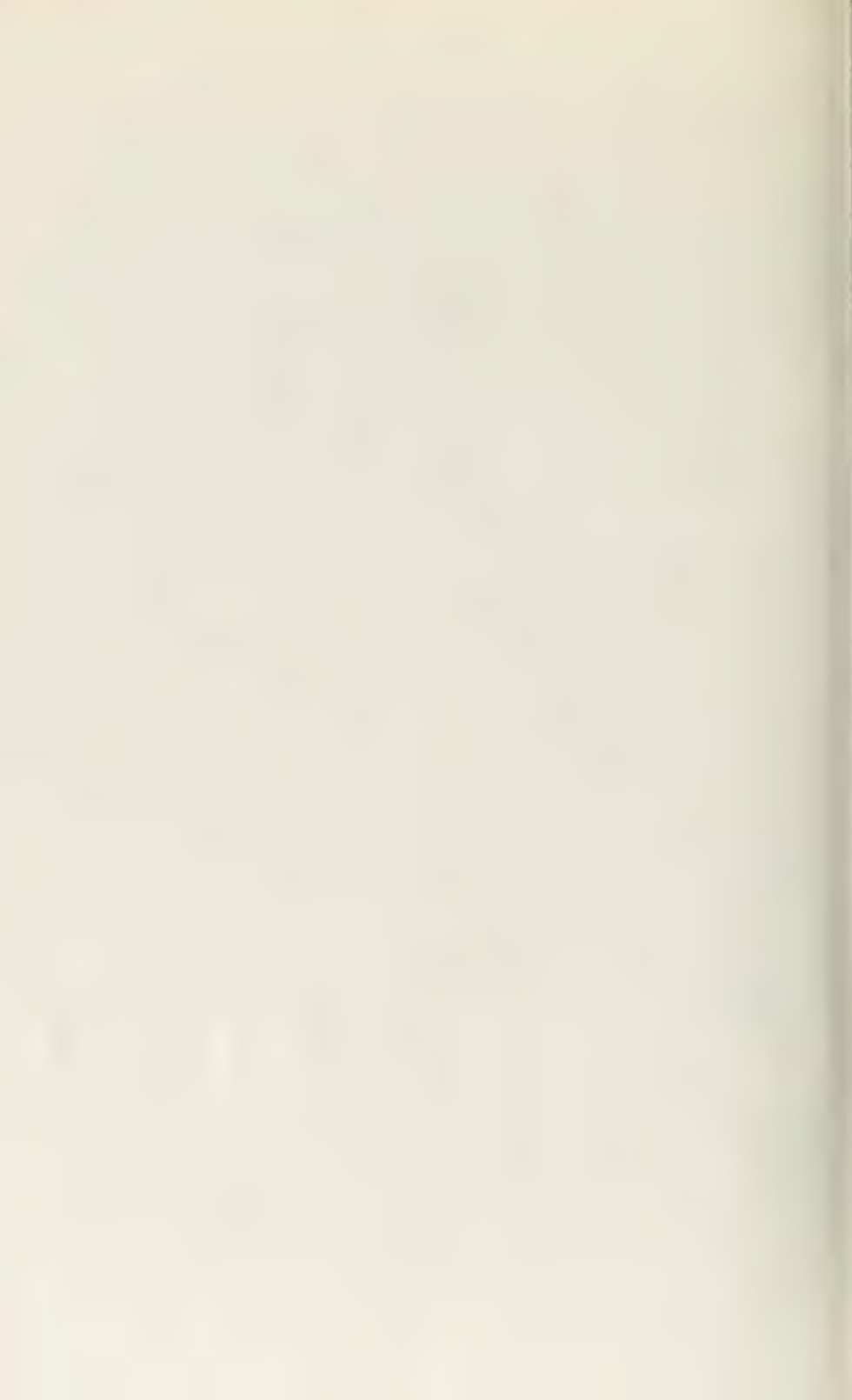
**TRANSCRIPT OF RECORD**

**Filed**

**MAY 8 - 1915**

**F. D. Monckton**  
Clerk

*Upon Writ of Error from the United States District  
Court for the District of Idaho, Eastern  
Division.*





No. ....

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JOSEPH B. BISTLINE,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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**TRANSCRIPT OF RECORD**

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*Upon Writ of Error from the United States District  
Court for the District of Idaho, Eastern  
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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

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Idaho, and Attorney for the Plaintiff,

J. S. McClear, Boise, Idaho,  
United States Attorney for the District of  
Idaho, and Attorney for the Plaintiff, succes-  
sor to said C. H. Lingenfelter,  
Attorneys for Defendant in Error.



*In the District Court of the United States, within  
and for the District of Idaho, Eastern Division.*

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THE UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

JOSEPH B. BISTLINE,

*Defendant.*

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*Complaint Action at Law.*

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Comes now the plaintiff, United States of America, by C. H. Lingenfelter its attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States, and for cause of action against the defendant complains and alleges as follows:

1—

That at all the times herein mentioned the defendant, Joseph B. Bistline, was a citizen of the United States, and a resident of the County of Bannock and State and District of Idaho.

2—

That prior to the acts herein complained of, the plaintiff was the owner in fee simple and in the possession of the following public lands of the United States, to-wit: The West half ( $W\frac{1}{2}$ ) of the Northwest quarter ( $NW\frac{1}{4}$ ), and the Southeast quarter ( $SE\frac{1}{4}$ ) of the Northwest quarter ( $NW\frac{1}{4}$ ), and Southwest quarter ( $SW\frac{1}{4}$ ) of the Northeast quarter

(NE $\frac{1}{4}$ ) of Section Eight (8) Township Six (6) South of Range Thirty-four (34) East of Boise Meridian, containing one hundred sixty (160) acres, more or less.

## 3—

That on the 16th day of September, 1904, the defendant, Joseph B. Bistline, desired to secure for himself the title, use and possession of the land hereinbefore described and for that purpose filed an application in the United States Land Office at Blackfoot, Idaho, under Section 2289 of the Revised Statutes of the United States to enter as a homestead the real estate mentioned and described in paragraph 2 hereof; that on the said 16th day of September, 1904, the said applicant received Receiver's Receipt No. 9880 for sixteen (\$16.00) dollars, being the amount of fee and compensation of the Register and Receiver for said entry under Section 2290 of the Revised Statutes of the United States, from the then Receiver of the said United States Land Office,

## 4—

That further, for the purpose of securing the title, use and possession of the land aforesaid, the said defendant, Joseph B. Bistline, on the 15th day of September, 1904, subscribed and swore to his homestead affidavit, as required under Section 2290 of the Revised Statutes of the United States, before one Fred G. Caldwell, the then Deputy Clerk of the United States District Court for the District of Idaho, and thereafter filed the said affidavit in the

United States Land Office at Blackfoot, Idaho, in which affidavit the affiant stated and swore, among other things, that his application, for the land heretofore described, was honestly and in good faith made for the purpose of actual settlement and cultivation, and that he would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for and that he applied for the same in good faith to obtain a home for himself and his family

## 5—

Further, to enable him to secure the title, use and possession of the said land, the said Joseph B. Bistline on the 8th day of December, 1905, claimed the right to commute, under the provisions of Section 2301 of the Revised Statutes of the United States, of his said entry before one Fred G. Caldwell, a then duly acting and qualified Deputy Clerk of the United States District Court for the District of Idaho, at Pocatello, Idaho, and in pursuance of such claim, did on the 8th day of December, 1905, appear before such Deputy Clerk, as aforesaid, and swore and subscribed to an affidavit, and at the same time and place and before the same officer, appeared Theodore Swanson and William F. Kasiska, as witnesses for said Joseph B. Bistline, on final proof, and they the said witnesses, subscribed and swore to their respective affidavits that are required by law, in each of which affidavits the affiant therein stated and swore, among other things, that he, Joseph B. Bist-

line, had settled upon the homestead on about the middle of March, 1905, and had established actual residence thereon at the same time; that the claimant and family resided continuously on the homestead since first establishing residence thereon and that he had not been absent from the land since making settlement; that the entryman had acted in good faith, but complainant alleges that the said affidavit of the said Joseph B. Bistline, and the affidavit of the said Theodore Swanson, and the said affidavit of the said William F. Kasiska, referred to in this paragraph, were all and each of them false, fraudulent and untrue in this: that in truth and in fact, it was not true that the claimant and his family resided continuously on the homestead since first establishing residence thereon about the middle of March, 1905, to the time of the said final proof, and that the entryman had not been absent from the land since making settlement, that in truth and in fact, at the time of the subscribing and swearing to said affidavits and the filing thereof in the United States Land Office as hereafter set forth, the said entryman, and his family, *had lived continuously off and away from said homestead since first making settlement, and with his family was continuously absent from his said homestead at all the times from the date of the said time claimed as the time of settlement, to the time of final proof on commutation*; that in truth and in fact that all the time that the said Joseph B. Bistline claimed residence upon said homestead and that he had not been absent from said



homestead, he was in fact making his home with his family in the city of Pocatello, Idaho, off and away from said homestead and continuously resided with his family in said city of Pocatello, Idaho, at all the times which he stated in his affidavit aforesaid, that he had resided upon said homestead, and had not been absent therefrom; all of which was well and truly known to each of them, the said Joseph B. Bistline, and the said Theodore Swanson and the said William F. Kasiska, when they made their several and respective affidavts as alleged in this paragraph; and the complainant further alleges, that the affidavits referred to in this paragraph, were, after being so subscribed and sworn to before the said Deputy Clerk of the United States District Court aforesaid, by the said Joseph B. Bistline, caused to be filed in the United States Land Office at Blackfoot, Idaho, and were made, sworn to, subscribed and filed in the said land office with the intention and purpose on the part of the said Joseph B. Bistline that the same should be read and relied upon by the said officers of the complainant and for the purpose of enabling the said Joseph B. Bistline to secure to himself the title, use and possession of the said tract of land and ultimately obtain the patent hereinafter mentioned.

## 6—

That the officers of the complainant charged with the disposition of the public lands of the complainant relied upon and were deceived and misled by the said statements so made by the said Joseph B. Bist-

line, and the said Theodore Swanson and the said William F. Kasiska in their several and respective affidavits and supposed and believed the said statements to be true and because they were so deceived and mislead and because they so relied upon the said statements and believed them to be true, the said officers *issued and delivered to the said Joseph B. Bistline the complainant's patent dated June 30, 1906*, conveying to the said Joseph B. Bistline the legal title to the said land.

## 7—

That on or about November, 1910, said defendant together with his wife, Grace Bistline, falsely and fraudulently conveyed by warranty deed for a valuable consideration, all their right, title and interest in and to the Southwest quarter (SW $\frac{1}{4}$ ) of the Northwest quarter (NW $\frac{1}{4}$ ), and the Southeast quarter (SE $\frac{1}{4}$ ) of the Northwest quarter (NW $\frac{1}{4}$ ) of Section Eight (8), Township Six (6) South of Range Thirty-four (34) East of Boise Meridian, and on the 20th day of September, 1910, the said defendant, together with his wife, Grace Bistline, for a valuable consideration falsely and fraudulently conveyed by warranty deed all their right, title and interest in and to the Northwest quarter (NW $\frac{1}{4}$ ) of the Northwest quarter (NW $\frac{1}{4}$ ) of Section Eight (8), Township Six (6) North of Range Thirty-four (34) East of Boise Meridian to Henry Karibo and Samuel Bloom, and that on the 1st day of November, 1910, defendant, together with his wife, Grace Bistline, falsely and fraudulently conveyed by warranty

deed for a valuable consideration to one Henry S. Woodland, all their right, title and interest in and to the Southwest quarter (SW $\frac{1}{4}$ ) of the Northeast quarter (NE $\frac{1}{4}$ ) of Section Eight (8), Township Six (6) South of Range Thirty-four (34) East of Boise Meridian, and the said grantees named in said deed went into immediate possession and still continue to hold the legal title to said lands.

8—

That the reasonable value of said lands, so acquired by the defendant by false and fraudulent representations as aforesaid, is Eight Thousand Dollars (\$8,000.00) and that at the time of the issuance of patent plaintiff to defendant as aforesaid, the reasonable value of said lands was the sum of \$1600.00.

That by reason of the premises the said defendant has falsely and fraudulently appropriated and converted the proceeds of said sale to his own use and falsely and fraudulently divested the said plaintiff of the title to said lands to the damage to the plaintiff in the sum of Eight Thousand Dollars (\$8,000.00).

Wherefore, plaintiff prays judgment against the said defendant for the said sum of Eight Thousand Dollars (\$8,000.00) together with interest thereon at the rate of seven per cent (7%) per annum from the 30th day of June, 1906, and for costs of suit.

C. H. LINGENFELTER,

*United States Attorney for the District of Idaho,  
and Attorney for the Plaintiff.*

State of Idaho,  
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, upon his oath deposes and says: that he is the United States Attorney for the District of Idaho, and attorney for the plaintiff; that he makes this affidavit for and on behalf of the United States, plaintiff herein; that he has read the above and foregoing complaint and knows the contents thereof, and believes the facts therein stated to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 17th day of September, 1913.

A. L. RICHARDSON,

Endorsed:

*Clerk.*

Filed, Sept. 17, 1913.

A. L. Richardson, Clerk.

---

*In the District Court of the United States, within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

DEMURRER TO COMPLAINT.

Comes now the defendant, subject to his motion to strike paragraph seven from the complaint on file herein and without waving any rights under said



motion, demurs to the said complaint for the reasons and upon the grounds following, to-wit:

1. That said complaint fails to state facts sufficient to constitute a cause of action.

2. That the alleged cause of action stated in said complaint is barred by the provisions of section 8 of 26 Statutes At Large of the United States; and the facts alleged in said complaint as said cause of action are barred by the provisions of said statute.

THOS. F. TERRELL and

WITTY & TERRELL,

*Attorneys for Defendant,*

Endorsed. Residence, Pocatello, Idaho.

Filed, *Oct* 3, 1913.

A. L. Richardson, Clerk.

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### JOURNAL ENTRY.

#### *Order Overruling Demurrer.*

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Saturday the 31st day of January, 1914.

Present: Hon. Frank S. Dietrich, Judge.

THE UNITED STATES,

vs.

JOSEPH B. BISTLINE.

No. 158. Eastern Division.

On this day was announced the decision of the court upon the demurrer to the complaint herein heretofore argued and submitted which decision is in writing and on file, and in accordance therewith,

it is ordered that said demurrer be and the same is hereby overruled and the defendant is given thirty days from this date in which to plead further. An order having been entered on October 15, 1913, sustaining defendant's motion to strike out paragraph 7 of the complaint in said cause, it is now ordered that said order be and the same is hereby set aside and vacated, and the said paragraph 7 of the complaint is permitted to stand.

---

*In the District Court of the United States, within  
and for the Eastern Division, District of Idaho.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

ANSWER.

*Comes Now the Defendant*, and for answer to the complaint of the plaintiff on file herein admits, denies and alleges as follows:

1. This defendant admits that at all times mentioned in the plaintiff's complaint he was, and now is, a citizen of the United States and a resident of the County of Bannock, State of Idaho;

2. This defendant admits that prior to the acts complained of in the plaintiff's complaint the United States of America was the owner in fee of the West half of the Northwest quarter ( $W\frac{1}{2}NW\frac{1}{4}$ ) and the Southeast quarter of the Northwest quarter

(SE $\frac{1}{4}$ NW $\frac{1}{4}$ ) and the Southwest quarter of the Northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$ ) of Section Eight in Township Six, South of Range Thirty-four East of the Boise Meridian, containing one hundred sixty (160) acres;

3. This defendant admits that about the 16th day of September, 1904, he desired to secure for himself the title, use and possession of the lands hereinbefore described, and for that purpose filed an application in the U. S. Land Office at Blackfoot, Idaho, under Section 2289 of the Revised Statutes of the United States, to enter as a homestead the real estate hereinbefore described, and that on said date this defendant received a receipt of the Receiver of said land office, No. 9880, for the sum of sixteen dollars, being the amount in fee and compensation of the Register and Receiver of the said land office for the entry of this defendant of said lands, under Section 2290 of the Revised Statutes of the United States; and this defendant further alleges that at the same time and place he paid to the said Receiver of said land office the further sum of one hundred dollars, the same being a portion of the purchase price of the said lands required by the United States to be paid by this defendant at the time of his said entry.

4. This defendant further admits that for the purpose of securing the title, uses and possessions of the said lands he, on the 15th day of September, 1904, subscribed and swore to his homestead affidavit as required by the laws of the United States, before one Fred G. Caldwell, the then Deputy Clerk

of the United States District Court for the District of Idaho, and thereafter caused to be filed the said affidavit in the U. S. land office at Blackfoot, Idaho; and this defendant admits that in said affidavit he stated and swore, among other things, that his application for the lands above described was honestly and in good faith made for the purpose of actual settlement and cultivation, and that he, the said Joseph B. Bistline, did faithfully and honestly endeavor to comply with all of the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the lands so applied for, and that he applied for the same in good faith and to obtain a home for himself and family; and this defendant avers that all of the said statements so made in said affidavit were, at the time the same were made, ever since have been and now are, true.

5. That this defendant further admits, that to enable him to secure the title, use and possession of the said lands that he, on or about the 8th day of December, 1905, claimed the right to commute, under provisions of Section 2301 of the Revised Statutes of the United States, of his said entry, before the said Fred G. Caldwell, Clerk as aforesaid, at Pocatello, Idaho; and in pursuance of said claim, on or about the 8th day of December, 1905, appeared before the said Deputy Clerk, and swore and subscribed to an affidavit, and at the same time and place and before the same officer appeared Theodore Swanson and William F. Kasiska, as witnesses for this defendant on his final proof and they, the said



witnesses, subscribed and swore to their respective affidavits in that behalf as required by law. In each of the affidavits, the affiants therein stated and swore, among other things, that he, Joseph B. Bistline, had settled upon said homestead on or about the middle of March, 1905, and had established actual residence thereon at the same time; that the claimant and his family resided continuously on the homestead since first establishing residence thereon, and that said claimant had not been absent since making settlement; that the entryman had acted in good faith; but defendant denies that said affidavits, or either of them, as made by this defendant, or by the said Theodore Swanson, or by the said William F. Kasiska, were or are false, fraudulent or untrue in the respects alleged in said complaint, or in any respect whatever; and this defendant denies that at the time of making said affidavits or either or any of them, that in truth or in fact it was not true that the claimant or his family resided continuously on the homestead aforesaid since he first established his residence thereon about the middle of March, 1905, at the time of his said final proof, and that he had not been absent from the land since making settlement, and denies that in truth or in fact at the time of subscribing and swearing to said affidavits, or at the time of the filing thereof in the U. S. Land Office the said entryman or his family had lived continuously off or away from said homestead since first making settlement, or with his family had lived continuously off or away from said homestead since

first making settlement, or with his family was continuously absent from said homestead at all the times or at any time from the said time claimed as to the time of settlement, to the time of final proof on commutation; and denies that at the time of making of said affidavits, or at any other time, that it was true or was a fact that at all or any of the times said defendant claimed residence upon said homestead he had been or was absent from said homestead or had been or was making his home with his family in the city of Pocatello, off or away from said homestead; and denies that at the time of making the said affidavit or of the filing of the same in the land office aforesaid, it was true or was a fact that he had resided off and away from said homestead or had continuously resided with his family in the city of Pocatello, Idaho, at all times which he stated in his affidavit aforesaid he had resided upon said homestead and had not been absent therefrom.

And this defendant further denies that he, or the said Theodore Swanson or the said William F. Kasiskan, or either of them, when they made their several and respective affidavits as aforesaid, well and truly or otherwise knew that the said affidavits, or either of them, was false or untrue as alleged in said complaint, or in any other respects whatever, but this defendant alleges the facts to be that at the time the said affidavits were made, and at the time the same were filed in the land office as aforesaid, and during the time of entry of the said Joseph B. Bistline of the lands aforesaid and down to the time

of making and filing said affidavits, that the defendant with his family resided continuously upon the lands aforesaid, and that he had not been absent from said lands since making settlement thereon, except casually in attendance upon the business of his usual occupation ;

And the defendant further alleges, that he had a dwelling house upon said land during all of the said time and had made his home with his family upon said lands to the exclusion of a home elsewhere and had in all respects complied with the requirements of the laws of the United States requisite to obtain title to said land as a homestead and this defendant admits that the affidavits above referred to were, after being subscribed and sworn to before said Deputy Clerk, of the United States District Court, as aforesaid, were by this defendant caused to be filed in the land office at Blackfoot, Idaho, and that they were made, subscribed and sworn to and filed in the said office for the purpose and intention on the part of the defendant that the same should be read and relied upon by the said office of the United States, and for the purpose of enabling this defendant to secure for himself the title, use and possession of the said tract of land and ultimately to obtain the patent mentioned in the said complaint.

6. This defendant further says, that he has every reason to believe and therefore alleges, that the officers of the plaintiff charged with the disposition of public lands of the plaintiff relied upon the said statements so made by this defendant and by his

witnesses aforesaid, and that said officers supposed and believed the said statements to be true; but this defendant denies that the said officers, or either of them, were deceived or misled by said statements, or any of them, and denies, because the said officers were deceived or misled, that they or either of them issued and delivered to this defendant plaintiff's patent, dated June 30, 1906, conveying to the said defendant the legal title to the said lands above described, but on the contrary this defendant alleges that because of the statements made in said affidavits, all of which were true at the time the same were made, and which statements complied with the laws of the United States relative to the making of the final proof of the homestead claims, the said officers in compliance with law and with their duties in that respect did legally and justly issue to this defendant the patent aforesaid to which he, this defendant, at the time of the issuance of the said patent was, and still is, entitled.

7. That as to paragraph 7 of the plaintiff's complaint this defendant does not answer, for the reason that the same has been stricken from the said complaint by an order of the said court wherein this cause was pending.

8. This defendant denies, that the reasonable value of the said land so acquired by the defendant is of the value of one thousand six hundred dollars or in excess of the sum of one thousand dollars, and denies that he acquired said lands or any lands by fraudulent representations as aforesaid or by any



false or fraudulent representation; and this defendant further alleges, that at the time he filed upon the said lands as a homestead and at the time he made his final proof thereon and at the time he acquired a patent thereto as aforesaid, the said lands were desert, sage brush lands without water for irrigation and in the condition in which he received the title to the said lands, and at the time the patent thereto issued, the same were not worth to exceed one thousand dollars;

9. Denies that by reason of the premises, or for any other reason, the defendant has falsely or fraudulently appropriated or converted the proceeds of the said or any sale of the said lands to his own use, or falsely or fraudulently divested the plaintiff of the title to the said lands, to the damage to the plaintiff in the sum of one thousand six hundred dollars, or in any other sum whatever.

WHEREFORE, defendant having answered to the plaintiff's complaint, prays that the plaintiff take nothing by the said complaint and that the same be dismissed absolutely, and that defendant have and recover from the plaintiff his costs herein expended and all other and proper relief.

THOS. F. TERRELL and  
WITTY & TERRELL,  
Attorneys for Defendant.

State of Idaho,  
County of Bannock,—ss.

Joseph B. Bistline, being first duly sworn, deposes and says: That he is the defendant in the above entitled action; that he has read the within and foregoing answer and knows the contents thereof, and verily believes the facts therein stated to be true.

JOSEPH B. BISTLINE.

Subscribed and sworn to before me, this 19th day of February, A. D. 1914.

(N. P. Seal.)      ROBERT M. TERRELL,  
Notary Public.

Endorsed: Filed Feb. 21, 1914. A. L. Richardson, Clerk.

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### JOURNAL ENTRY.

*Order Granting Defendant Leave to File Amendments to Answer.*

At a stated term of the District Court of the United States for the District of Idaho, held at Pocatello, Idaho, on Monday the 9th day of March, 1914.

Present: Hon. Frank S. Dietrich, Judge.

THE UNITED STATES,

vs.

JOSEPH B. BISTLINE.

No. 158.

Upon application of counsel for defendant, ordered that said defendant have leave to file amendments to the answer herein.

*In the District Court of the United States, within  
and for the Eastern Division of the  
District of Idaho.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

### AMENDMENT TO ANSWER.

Comes now the defendant, Joseph B. Bistline, with leave of court first had and obtained, filed this as an amendment to and as a further answer to his original answer on file herein, and says:

Strike out paragraph seven of said original answer and consider in lieu thereof, the following:

Answering unto paragraph seven of the plaintiff's complaint, this defendant denies that on or about November, 1910, or at any other time, the defendant with his wife, Grace Bistline, falsely or fraudulently conveyed by warranty deed for a valuable consideration or otherwise, all their right, title or interest in or to the southwest quarter of the northwest quarter or the southeast quarter of the northwest quarter of section eight in township six south of range thirty-four, east of Boise Meridian, or any part thereof; and denies that on or about the 20th of September, 1910, or at any other time, the defendant with his said wife, for a valuable consideration or otherwise falsely or fraudulently conveyed by warranty deed or otherwise all their right title or interest in or to

the northwest quarter of the northwest quarter of said section eight in said township and range, or any part thereof, to Henry Karibo and Samuel Bloom, or any other person; and denies that on the 1st day of November, 1910, or at any other time, the defendant with his said wife, falsely or fraudulently conveyed by warranty deed or otherwise for a valuable or any consideration to Henry Woodland or any other person, all or any of their right title or interest in and to the southwest quarter of the northeast quarter of said section, township and range, or any part thereof; and this defendant alleges that he did make the conveyances to the several persons above mentioned, for the lands above described, at or about the time alleged, but avers that each and every of said conveyances were made, executed and delivered to said above mentioned persons, for an adequate and valuable consideration, in good faith, honestly believing that this defendant was fully vested with the fee simple title to said lands so conveyed, and that he had acquired the said title from the plaintiff herein in the manner provided by law, and the rules and regulations of the Department of the Interior of the United States of America.

#### FURTHER ANSWER AND SEPARATE DEFENSE.

And this defendant further answering unto the plaintiff's complaint on file herein, alleges:

That on the 10th day of April, 1911, this plaintiff United States of America, with full knowledge of all



the facts, and of its rights in the premises, and upon which the action at bar is based, commenced an action against this defendant, Joseph B. Bistline, in the Circuit Court of the United States for the Eastern Division of the District of Idaho, being the equity division of the same court in which the present action is pending, to cancel, vacate and set aside the patent issued by the United States of America to the said Joseph B. Bistline for the identical lands described in the plaintiff's complaint herein, and the facts alleged in said action to cancel said patent are identical to the facts alleged herein as a basis of damages; that the said action so commenced to cancel said patent was answered by the defendant, and after issue was joined certain proceedings were had therein from time to time, until on or about the 17th day of September, 1913, when the said action to cancel said patent was dismissed and a judgment was duly made and given in favor of the defendant and against the plaintiff dismissing the said action to cancel said patent for the said lands described in said complaint and described in the complaint in this action;

That on the 11th day of April, 1911, when the plaintiff herein commenced said action against this defendant to cancel the patent for said lands, the plaintiff had the right and option to commence and pursue said action to cancel said patent or to ratify the title so conveyed by said patent and pursue an action to recover the value of said land conveyed by said patent, if the same had been fraudulently obtained;

And this defendant alleges that the plaintiff, on the 11th day of June, 1911, by the commencement of said action to cancel said patent and by a pursuit thereof to its dismissal and judgment on the 17th day of September, 1913, for the defendant, did exercise the plaintiff's right and option and then and there elected between two inconsistent remedies then open to the plaintiff's choice, and by such election of the remedy to be pursued, the plaintiff became, was and now is bound by the election and choice so made, and cannot now maintain this action for damages after having heretofore elected its action to cancel said patent as aforesaid.

And this defendant further alleges that the action so commenced by the plaintiff on the 10th day of April, 1911, against this defendant, to cancel the patent issued by the plaintiff conveying certain lands described therein and described in said action, to the defendant, was litigated and contested by an answer of the defendant tendering an issue upon all of the material allegations of the plaintiff's bill or complaint and setting forth new matter constituting a defense to said action; that the affirmative matter pleaded by the defendant in his said answer, was admitted by the plaintiff, and the defendant was at all times ready and willing to submit said action upon the issue tendered and demanded, time after time, the trial of said action; that the plaintiff failed, neglected and refused to make proof of the facts alleged in said bill or complaint, and being pressed for a trial, after a lapse of about three years, on account

of the issue tendered and matters pleaded by the defendant, dismissed said action and on or about the 17th day of September, 1913, a judgment in favor of the defendant and against the plaintiff was duly made and given in said court and cause dismissing the said action absolutely and unconditionally, which said judgment is now in full force and effect and is conclusive of all of the facts in issue in said action;

That this action by the plaintiff against the defendant for damages is based upon and grows out of the same facts in issue and determined in said former action to cancel said patent, and the facts alleged in the complaint herein as a basis for plaintiff's claim for damages, are the identical facts alleged by the plaintiff in its former action as grounds for the cancellation of said patent;

That the failure of the plaintiff to prosecute the said action to cancel said patent for a period of nearly three years, during all of which time or the greater part thereof, the defendant was demanding a trial of said cause, and the admission of the plaintiff in open court that the plaintiff could not recover the relief sought nor any relief in said action, and the final dismissal thereof and the judgment of dismissal absolute, constitutes and is a determination of the merits of said controversy; and this action by the plaintiff, seeking to recover damages based upon the identical state of facts at issue in said former action, is an attempt to re-adjudicate a matter already heretofore fully determined.

*Wherefore*, defendant prays that plaintiff take nothing by its complaint herein, and that said action be barred and said complaint be dismissed absolutely, and for all other and further relief applicable in the premises.

THOS F. TERRELL and

R. M. TERRELL,

Attorneys for defendant,

Residence and Postoffice Address, Pocatello, Idaho.

State of Idaho,

Bannock County,—ss.

Joseph B. Bistline being first duly sworn deposes and says that he is the defendant in the above entitled action; that he has read the within and foregoing amendment to his answer heretofore filed herein, and knows the contents of said amendment; and he verily believes the facts stated in his said amendment to said answer to be true.

JOSEPH B. BISTLINE.

Subscribed and sworn to before me on this the 9th day of March, 1914.

(Seal.)

ROBERT M. TERRELL,

Notary Public.

Endorsed: Filed, March 9, 1914. A. L. Richardson, Clerk.



*In the District Court of the United States, Within  
and for the Eastern Division of the  
District of Idaho.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

MOTION TO STRIKE.

Plaintiff by counsel moves to strike out defendant's further answer and separate defense, and for cause thereof says that said answer and separate defense presents no valid defense to the action brought, and the same is, therefore, irrelevant and immaterial, and if the facts pleaded in said plea were true, it would not and should not defeat plaintiff's action.

J. L. MCCLEAR,

Attorney for Plaintiff,

Residence P. O., Boise, Idaho.

Received copy this March 10th, 1914.

THOS. F. TERRELL,

Attorney for Defendant.

Endorsed: Filed, March 10, 1914. A. L. Richardson, Clerk.

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JOURNAL ENTRY.

*Order Denying Plaintiff's Motion to Strike Out Certain Portions of Defendant's Answer.*

At a stated term of the District Court of the

United States for the District of Idaho, held at Boise, Idaho, on Monday the 15th day of June, 1914.

Present: Hon. Frank S. Dietrich, Judge.

THE UNITED STATES,

vs.

JOSEPH B. BISTLINE.

No. 158, Eastern Division.

A memorandum decision having been filed June 12, 1914, in this cause upon plaintiff's motion to strike out certain portions of the answer, which decision is to the effect that said motion be denied, now in accordance with said decision it is ordered that said motion to strike out portions of the answer in this cause be and the same is hereby denied.

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VERDICT.

*In the District Court of the United States for the  
District of Idaho, Eastern Division.*

THE UNITED STATES,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

VERDICT.

We the jury in the above entitled cause find for the plaintiff and assess the damages in the sum of \$600.00, without interest.

WILLIAM DEWEY,

Foreman.

Endorsed: Filed March 16, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for  
the District of Idaho, Eastern Division.*

No. 158.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

### JUDGMENT.

On the 16th day of March, 1914, this cause coming on regularly for trial, and the said parties appearing by their respective attorneys, a jury of twelve persons was regularly impaneled and sworn to try said action, whereupon witnesses on behalf of plaintiff and of defendant were sworn and examined and documentary evidence introduced. After hearing the evidence, the argument of counsel and the instructions of the court the jury retired to consider their verdict and subsequently returned in court, and being called answered to their names and said they found a verdict for the plaintiff against the defendant in the sum of six hundred (\$600.00) dollars.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of six hundred (\$600.00) dollars, with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid, together with said plaintiff's costs and disburse-

ments in this cause laid out and expended, which costs are hereby taxed in the sum of \$17.80.

Judgment rendered March 24, 1915.

FRANK S. DIETRICH,

Judge of the above entitled Court.

Endorsed: Filed this 24th day of March, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

### BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause was commenced on the 17th day of September, 1913, by complaint filed herein, to which reference is hereby made for particulars;

That thereafter defendant filed his demurrer to said complaint on the 3rd day of October, 1913, to which reference is hereby made for particulars;

That thereafter on the 31st day of January, 1914, the Court overruled and denied the said demurrer, to which ruling of the Court the defendant then and there excepted and now excepts, and assigns the same as error;

That thereafter on the 21st day of February, 1914, defendant filed his answer to the complaint,



and thereafter on the 9th day of March, 1914, by leave of court filed his amendment to said answer, to which said answer and amendment thereto reference is hereby made for particulars;

Thereafter on the 10th day of March, 1914, plaintiff filed its motion to strike the affirmative matter pleaded in said amendment to answer in bar of the plaintiff's cause of action, which motion was denied, and the said cause came to issue upon the said complaint, and the said answer and amendment thereto as aforesaid;

Upon the issue thus joined the said cause came regularly on for trial before said court and a jury duly empaneled, on the 16th day of February, 1915, which resulted in a verdict and judgment in favor of the plaintiff and against the defendant in the sum of six hundred dollars;

That thereafter on the 17th day of March, 1915, defendant filed and presented his petition to vacate and set aside the said verdict and judgment, and to grant defendant a new trial of said cause for the reasons and upon the grounds herein specified and assigned as error, but the court denied and refused the said petition, to which ruling the defendant then and there excepted and now excepts and assigns the same as error;

At the commencement of said trial and before any testimony was given, the defendant objected to the first testimony offered and to any testimony or evidence offered or submitted in the trial of said cause

for the reason that the complaint therein failed to state facts sufficient to constitute a cause of action or any part of a cause of action, or to entitle the plaintiff to any relief whatever, which objection was by the court overruled and denied, to which ruling of the court the defendant then and there excepted and now excepts;

Thereafter the plaintiff immediately offered testimony in proof of the allegations of the complaint, which was received by the court, subject to the objection of the defendant last aforesaid, and among other testimony offered by the plaintiff and received by the court was three certain deeds of conveyance made, executed and delivered the defendant Joseph B. Bistline and his wife Grace Bistline, to the persons and of the dates and acreage following, to-wit:

To Joseph H. Tolman, Jr., November 4th, 1910, eighty acres;

To Henry Caribo and Samuel Bloom, September 20th, 1910, forty acres;

To Henry S. Woodland, November 1st, 1910, forty acres;

That all of said deeds of conveyance were duly executed and delivered for a valuable consideration, and the grantees therein named went into immediate possession of said respective tracts thereunder, and still continue to hold the legal title to said lands; and the said deeds and each of them were on or about their respective dates duly recorded in the office of the County Recorder of Bannock County, State of

Idaho, in accordance with the laws of the State of Idaho; and the said conveyances covers and conveys all of the lands described in the plaintiffs complaint herein and in the patent therein described;

Thereupon the plaintiff rested its case, and the defendant offered in evidence, a bill in equity filed in said court on the 10th day of April, 1911, wherein The United States of America is complainant and Joseph B. Bistline is defendant, he being the same person who is defendant in the case at bar, for the cancellation of the same patent which is described in the complaint in the case at bar; the defendant also offered in evidence with said bill in equity, the answer of the defendant thereto, and the replication of the complainant to said answer, and the decree of said court upon the issues thus joined; which said "Bill of Complaint to Cancel Patent," "Answer to Bill of Complaint," "Replication," and "Decree," are marked defendants exhibits "A," "B," "C" and "D" respectively, and are in words and figures following, to-wit:

DEFENDANT'S "EXHIBIT A."

*In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho  
Eastern Division.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

JOSEPH B. BISTLINE,

Defendant.

## IN EQUITY.

*Bill of Complaint to Cancel Patent.*

*To the Honorable Judges of the Circuit Court of the United States, for the District of Idaho:*

Geo. W. Wickersham, Attorney General of the United States of America, for and on behalf of the United States of America, complainant, brings this bill of complaint against Joseph B. Bistline, defendant, and thereupon your orator complains and says:

## I.

That at all the times herein mentioned the defendant Joseph B. Bistline was and now is, a citizen of the United States and a resident of the County of Bannock, State and District of Idaho.

## II.

That prior to the acts hereinafter complained of, the complainant was the owner in fee simple and in the possession of the following public lands of the United States, to-wit: The north half of the northwest quarter and the southeast quarter of the northwest quarter and the southwest quarter of the northeast quarter of section eight in township six, south of range thirty-four, east of the Boise Meridian containing one hundred and sixty acres, more or less.

## III.

That on the 16th day of September, 1904, one Joseph B. Bistline, the defendant herein, desired to secure for himself the title, use and possession of the land hereinbefore described and for that purpose filed an application in the United States Land Office



at Blackfoot, Idaho, under Section 2289 of the Revised Statutes of the United States to enter as a homestead the real estate mentioned and described in paragraph "II" hereof; that on the said 16th day of September, 1904, the said applicant received Receiver's Receipt No. 9880 for sixteen dollars, being the amount of fee and compensation of Register and Receiver for said entry under Section 2290 Revised Statutes of the United States, from the then Receiver of the said United States Land Office.

#### IV.

That further for the purpose of securing the title, use and possession of the land aforesaid, the said Joseph B. Bistline, on the 15th day of September, 1904, subscribed and swore to his homestead affidavit, as required under Section 2290 of the Revised Statutes of the United States, before one Fred G. Caldwell, the then Deputy Clerk of the United States District Court for the District of Idaho, and thereafter filed the said affidavit in the United States Land Office at Blackfoot, Idaho, in which affidavit the affiant stated and swore, among other things, that his application, for the land heretofore described, was honestly and in good faith made for the purpose of actual settlement and cultivation and that he would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for and that he applied for same in good faith to obtain a home for himself and his family.

## V.

Further, to enable him to secure the title, use and possession of the said land, the said Joseph B. Bistline, on the 8th day of December, 1905, claimed the right to commute, under the provisions of Section 2301 of the Revised Statutes of the United States, of his said entry before one Fred G. Caldwell, a then duly acting and qualified Deputy Clerk of the United States District Court for the District of Idaho, at Pocatello, Idaho, and in pursuance of such claim, did on the 8th day of December, 1905, appear before such Deputy Clerk, as aforesaid, and swore and subscribed to an affidavit, and at the same time and place and before the same officer, appeared Theodore Swanson and William F. Kasiska, as witnesses for said Joseph B. Bistline, on final proof, and they the said witnesses, subscribed and swore to their respective affidavits in that behalf as required by law, in each of which affidavits the affiant therein stated and swore, among other things, that he, Joseph B. Bistline had settled upon the homestead on about the middle of March, 1905, and had established actual residence thereon at the same time; that the claimant and family resided continuously on the homestead since first establishing residence thereon and that he had not been absent from the land since making settlement; that the entryman had acted in good faith, but complainant alleges that the said affidavit of the said Joseph B. Bistline, and the said affidavit of the said Theodore Swanson, and the said affidavit of the said William F. Kasiska, referred

to in this paragraph of this bill, were all and each of them false, fraudulent and untrue in this; that in truth and in fact it was not true that the claimant and family resided continuously on the homestead since first establishing residence thereon about the middle of March, 1905, to the time of the said final proof, and that the entryman had not been absent from the land since making settlement, that in truth and in fact, at the time of the subscribing and swearing to said affidavits and the filing thereof, in the United States Land Office as hereafter set forth, the said entryman, and his family, had lived continuously off and away from said homestead since first making settlement, and with his family was continuously absent from his said homestead at all the times from the date of the said time, claimed as the time of settlement, to the time of final proof on commutation; that in truth and in fact that all the time that the said Joseph B. Bistline claimed residence upon said homestead and that he had not been absent from said homestead, he was in fact making his home with his family in the city of Pocatello, Idaho, off and away from said homestead and continuously resides with his family in said city of Pocatello, Idaho, at all the times which he stated in his affidavit, aforesaid, that he had resided upon said homestead, and had not been absent therefrom; all of which was well and truly known to each of them, the said Joseph B. Bistline, and the said Theodore Swanson and the said William F. Kasiska, when they made their several and respective affidavits as alleged in this paragraph

of this bill; and the complainant further alleges, that the affidavits referred to in this paragraph of this bill, were, after being so subscribed and sworn to before the said Deputy Clerk of the United States District Court aforesaid, by the said Joseph B. Bistline, caused to be filed in the United States Land Office at Blackfoot, Idaho, and were made, sworn to, subscribed and filed in the said Land Office with the intention and purpose on the part of the said Joseph B. Bistline that the same should be read and relied upon by the said officers of the complainant and for the purpose of enabling the said Joseph B. Bistline to secure to himself the title, use and possession of the said tract of land and ultimately obtain the patent hereinafter mentioned.

## VI.

That the officers of the complainant charged with the disposition of the public lands or the complainant relied upon and were deceived and misled by the said statements so made by the said Joseph B. Bistline, and the said Theodore Swanson and the said William F. Kasiska in their several and respective affidavits and supposed and believed the said statements to be true and because they were so deceived and misled and because they so relied upon the said statements and believed them to be true the said officers issued and delivered to the said Joseph B. Bistline the complainant's patent dated June 30th, 1906, conveying to the said Joseph B. Bistline the legal title of the said land.



All of which said actings, doings and pretences of the said Joseph B. Bistline, Theodore Swanson and William F. Kasiska are contrary to equity and good conscience and tend to the manifest injury and oppression of the complainant.

*Wherefore*, foreasmuch, as the complaint is remediless according to the strict rules of the common law and can have relief only in a court of equity where matters of this nature are property cognizable and relievable:

*To the end*, therefore, that the said defendant may full true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged, but not on oath, his answer on oath being hereby expressly waived, as fully and particularly as if the same were hereinafter repeated and he distinctly interrogated; that the said defendant Joseph B. Bistline, may be adjudged and decreed to have defrauded the complainant of the land hereinbefore set out and that by reason of such fraud the patent so issued by the complainant to the said Joseph B. Bistline, may be revoked, cancelled and held for naught; that all and singular of said lands mentioned and involved herein may be decreed to be the property of the complainant and that the title to the same may be restored to and the right of possession given to the complainant; and that the complainant may have such other and further relief in the premises as may seem meet and proper to this Honorable Court and as shall be agreeable to equity and good conscience.

*May it please your honors* to grant unto the complainant a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the said Joseph B. Bistline, requiring him at a time certain and under a certain penalty, therein to be named personally to be and appear before this Honorable Court, and then and there to answer all and singular the matters and things here stated and to stand to and abide by the rules and decrees of this Honorable Court as to the Court may seem equitable and just.

(Signed) GEO W. WICKERSHAM,  
Attorney General for the United States of America.

C. H. LINGENFELTER,  
United States Attorney for the District of Idaho.

S. L. TIPTON,  
Assistant U. S. Attorney for the District of Idaho.

Filed April 10th, 1911. (Signed) A. L. Richardson, Clerk.

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DEFENDANT'S "EXHIBIT B."

*In the Circuit Court of the United States Ninth Ju-  
dicial Circuit for the District of Idaho,  
Eastern Division.*

THE UNITED STATES OF AMERICA,  
Complainant,

vs.

JOSEPH B. BISTLINE,

Defendant.

IN EQUITY.

*Answer to Bill of Complaint.*

This defendant, now and at all times saving and reserving unto himself all benefit and advantage of the exceptions to the many errors, uncertainties, imperfections and insufficiencies in the complainant's bill of complaint contained, for answer thereto, or so much and such parts thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

1st. This defendant admits that at all the times mentioned in the complainant's bill of complaint, he was and now is a citizen of the United States and a resident of Bannock County, State of Idaho.

2nd. This defendant admits that prior to the acts complained of in the complainant's bill of complaint, the said complainant, The United States of America, was the owner in fee simple of the north half of the northwest quarter and the southeast quarter of the northwest quarter and the southwest quarter of the northeast quarter of section 8, in township 6, south of range 34, east of Boise Meridian, in Bannock County, State of Idaho.

3rd. This defendant denies that on or about the 16th day of September, 1904, or at any other time, Joseph B. Bistline, the defendant herein, desired to secure for himself the title, use and possession of the following described lands, to-wit: The east half of the northwest quarter and the southeast quarter of the northwest quarter and the southwest quarter of

the northeast quarter of said section 8 in said township and range and for that purpose, defendant filed an application in the United States Land Office at Blackfoot, Idaho, under Section 2889 of the Revised Statutes of the United States, to enter as a homestead, the real estate last described, and that on said date the said Joseph B. Bistline received the receipt of the Receiver of said land office, No. 9880 and paid therefor the sum of sixteen (\$16.00) dollars, being the amount of fee and compensation of the Register and Receiver of said land office for the entry of said Joseph B. Bistline of said lands, under Section 2290 of the Revised Statutes of the United States; and this defendant further alleges that at the same time and place he paid to the Receiver of said land office the further sum of one hundred (\$100.00) dollars, the same being a portion of the purchase price for said lands required by the United States to be paid by this defendant at the time of his said entry.

4th. This defendant further admits that for the purpose of securing the title, use and possession of the last above described lands, the said defendant, Joseph B. Bistline, on the 15th day of September, 1904, subscribed and swore to his homestead affidavit as required by the laws of the United States, before one Fred G. Caldwell, the then Deputy Clerk of the United States District Court for the District of Idaho, and that thereafter the said Joseph B. Bistline caused to be filed the said affidavit in the United States Land Office at Blackfoot, Idaho; and this defendant admits that in said affidavit he stated and



swore among other things that his application for the lands above described, was honestly and in good faith made for the purpose of actual settlement and cultivation and that he, the said Joseph B. Bistline, would faithfully and honestly endeavor to comply with all the requirements of the law as to the settlement, residence and cultivation necessary to acquire title to the lands so applied for, and that he applied for the same in good faith, to obtain a home for himself and his family, and further avers that all of the said statements so made in the said affidavit were and are true.

5th. This defendant further admits that to enable him to secure the title, use and possession of said lands, that he on or about the 8th day of December, 1905, claimed the right to commute under the provisions of Section 2301 of the Revised Statutes of the United States, of his said entry before the said Fred G. Caldwell, Clerk as aforesaid, at Pocatello, Idaho, and in pursuance of said claim did, on or about the 8th day of December, 1905, appear before the said Deputy Clerk aforesaid, and swore and subscribed to an affidavit, and at the same time and place and before the same officer appeared Theodore Swanson and William F. Kasiska, as witnesses for this defendant on his final proof, and they, the said witnesses, subscribed and swore to their respective affidavits in that behalf as required by law, in each of which affidavits the affiants therein stated and swore among other things that he, Joseph B. Bistline, had settled upon said homestead on or about the middle

of March, 1905, and had established actual residence thereon at the same time; that the claimant and family resided continuously on the homestead since first establishing residence thereon and that said claimant had not been absent from said land since making settlement; that the entryman had acted in good faith; but defendant denies that said affidavits, or either of them, as made by the said Joseph B. Bistline, this defendant, or by the said Theodore Swanson or by the said William F. Kasiska, were, or are false, fraudulent or untrue in the respects alleged in said bill of complaint, or in any respect whatever; and this defendant denies that the time of the making of said affidavits, or either of them, that in truth or in fact it was not true that the claimant or his family resided continuously on the homestead aforesaid since he first established his residence thereon about the middle of March, 1905, to the time of his said final proof, and that he had not been absent from the land since making settlement; and denies that in truth and in fact at the time of subscribing and swearing to said affidavits, or at the time of the filing thereof in the United States Land Office, the said entryman and his family had lived continuously off and away from said homestead since first making settlement, and with his family was continuously absent from his homestead at all the times, or at any time from the said time claimed as the time of settlement, to the time of final proof on commutation; and denies that at the time of making of said affidavits, or at any

other time, that it was true or was a fact that at all or any of the times said defendant claimed residence upon said homestead, he had been or was absent from said homestead or had been or was making his home with his family in the city of Pocatello, Idaho, off or away from said homestead; and denies that at the time of making the said affidavits, or of the filing of the same in the land office aforesaid, it was true or was a fact that he had resided off or away from said homestead, or had continuously resided with his family in said city of Pocatello, Idaho, at all the times which he stated in his affidavit aforesaid that he had resided upon said homestead and had not been absent therefrom; and this defendant further denies that he, or the said Theodore Swanson, or the said William F. Kasiska, or either of them, when they made their several and respective affidavits as aforesaid, well or truly or otherwise knew that the said affidavits, or either of them was false or untrue, as alleged in said bill, or in any other respects whatever; but this defendant alleges the fact to be that at the time the said affidavits were made, and at the time that the same were filed in the land office aforesaid, and during the time since the entry of the said Joseph B. Bistline upon the lands aforesaid, and down to the time of the making and filing of said affidavits, that he with his family resided continuously on the lands aforesaid and that he had not been absent from the land since making settlement thereon; that he had a dwelling house upon said land during all of said time and had made his home with his family upon said lands to the exclusion of a home elsewhere,

and had in all respects complied with the requirements of the law requisite to obtain title to said lands as a homestead; and this defendant admits that the affidavits above referred to were, after being subscribed and sworn to before the aforesaid Deputy Clerk of the United States District Court aforesaid, by the said Joseph B. Bistline, caused to be filed in the United States Land Office at Blackfoot, Idaho, and that they were made, sworn to, subscribed and filed in the said land office with the intention and purpose on the part of the said Joseph B. Bistline to secure to himself the title, use and possession of the said tract of land and ultimately to obtain the patent mentioned in said bill of complaint.

6th. This defendant further says that he has every reason to believe and therefore alleges that the officers of the complainant, witnesses aforesaid, and that said officers supposed and believed the said statements to be true, by this defendant denies that the said officers or either of them were deceived or misled by said statements, or any of them, and denies because the said officers were deceived or misled that they, or either of them, the said officers, issued or delivered to the said Joseph B. Bistline, complainant's patent dated June 30, 1906, conveying to the said Joseph B. Bistline the legal title to said lands last above described; but on the contrary this defendant alleges that because of the statements made in said affidavits all of which were true at the time the same were made, and which said statements complied with the laws of the United States relative to making final proof on homestead claims, the said officers, in



compliance with the law, and with their duties in that respect, did legally and justly issue to the said Joseph B. Bistline the patent aforesaid, to which he, at the time of the issuance of the same was, and still is, entitled.

7th. This defendant denies that any acts or doings or pretenses of this defendant in the matter of his filing upon said lands, or his settlement of the same, or his final proof on the same, or that any acts of the said Theodore Swanson, or William F. Kasiska, in making affidavits on behalf of this defendant, is or ever was contrary to equity or good conscience, or that any of said acts tend, or ever tended to the manifest or other injury or oppression of the complainant.

8th. And this defendant further answering says: That after he had obtained patent for said lands last above described, in the manner provided by law, and was justly and legally seized and possessed of the same, that on or about the 4th day of November, 1910, this defendant and his wife, Grace Bistline, for a valuable and adequate consideration, and in good faith, sold, transferred and conveyed by a sufficient conveyance in writing, duly acknowledged and certified, all their right, title and interest in and to the southwest quarter of the northwest quarter and the southeast quarter of the northwest quarter of said Section 8, in said township and range, to Joseph H. Tolman, Jr., of Pocatello, Bannock County, State of Idaho, which said deed was duly delivered by this defendant to the said Joseph H. Tolman, Jr. and

thereafter duly recorded in the office of the County Recorder of Bannock County, State of Idaho; and that on or about the 20th day of September, 1910, this defendant and his said wife, Grace Bistline, for a valuable and adequate consideration and in good faith, sold, transferred and conveyed by a sufficient conveyance in writing, duly acknowledged and certified, all of their right, title and interest in and to the northwest quarter of the northwest quarter of said section 8, in said township and range to Henry Karibo and Samuel Bloom of Pocatello, Bannock County, Idaho, which said deed was duly delivered to the said Henry Karibo and Samuel Bloom, and thereafter recorded in the office of the County Recorder of said Bannock County, Idaho; and that on or about the first day of November, 1910, this defendant and his said wife, Grace Bistline, for a valuable and adequate consideration, and in good faith, sold, transferred and conveyed by a sufficient conveyance in writing, duly acknowledged and certified, all of their right, title and interest in and to the southwest quarter of the northeast quarter of said section 8, in said township and range, to Henry S. Woodland of Pocatello, Idaho, which said deed was duly delivered to the said Henry S. Woodland and thereafter duly recorded in the office of the County Recorder of said Bannock County; and each of the grantees to whom this defendant conveyed the said lands, as aforesaid, after the delivery of their respective deeds, went into the actual possession, use and occupation of the said lands and ever since the delivery of the said deeds,

as aforesaid, have been and now are in the actual, exclusive and notorious possession thereof, claiming title thereto; and this defendant therefore alleges that he disclaims any interest whatever in or to any of said lands or any part thereof.

All of which matters and things the defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and therefore prays hence to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) STANDROD & TERRELL,  
Solicitors and Counsel for Defendant.  
Residence, Pocatello, Idaho.

Received a copy of the foregoing answer this May 1st, 1911.

(Signed) C. H. LINGENFELTER,  
U. S. Attorney.

Filed May 2nd, 1911. (Signed) A. L. Richardson, Clerk.

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DEFENDANT'S EXHIBIT "C."

*In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho,  
Southern Division.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

JOSEPH B. BISTLINE,

Defendant.

## IN EQUITY—NO. 133.

*Replication.*

This repliant, saving and reserving to itself now and at all times hereafter all and all matter of benefits and advantages of exception which may be had and taken to the manifold insufficiencies of the said answer of the defendant Joseph B Bistline, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver, maintain and prove as this honorable court shall direct and humbly prays as in and by its said bill it hath already prayed

(Signed) C. H. LINGENFELTER,  
United States Attorney for the District of Idaho  
and Solicitor Complainant.

Filed September 17th, 1913. (Signed) A. L.  
Richardson, Clerk

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DEFENDANT'S EXHIBIT "D."

*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

JOSEPH B. BISTLINE,

Defendant.

IN EQUITY—NO. 133.

*Decree.*

This cause came on regularly for hearing before the Honorable F. S. Dietrich, Judge of the above entitled court, the plaintiff appearing by C. H. Lingenfelter, United States Attorney and Solicitor, for complainant, and upon motion of the Solicitor for the complainant, said suit is dismissed.

*Wherefore*, by reason of the premises, it is ordered, adjudged and decreed that said suit be dismissed and that the plaintiff take nothing by said action.

Dated this 17th day of September, 1913.

(Signed) FRANK S. DIETRICH,  
District Judge.

Filed September 17, 1913. (Signed) A. L. Richardson, Clerk.

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Said exhibits "A," "B," "C" and "D," was offered by the defendant in support of his plea in bar that plaintiff was bound by his previous election of remedies and could not maintain this action, and in sup-

port of defendant's further plea in bar that the facts pleaded as a cause of action in the case at bar had been adjudicated in a previous action; for that purpose the said evidence was admitted and received by the court; the defendant offered no further evidence, but relied upon said special pleas and rested;

That the said deeds and the record thereof, and the said exhibits was all of the evidence offered or received in support of or bearing upon the said special pleas;

Whereupon the defendant requested the court to pass upon and decide as to the sufficiency of the proof in support of his special plea of the previous election of remedies by the plaintiff, as a matter of law, and to instruct the jury to find for the defendant upon said plea, but the court refused to pass upon the sufficiency of the evidence in support of said plea, and refused to give the jury a peremptory instruction to find for the defendant upon said plea, but held that the court would submit the evidence under said plea to the jury under proper instruction; To which ruling of the court the defendant then and there excepted and now excepts;

Whereupon the defendant requested the court to pass upon and decide as to the sufficiency of the proof in support of the special plea of *res adjudicata*, as a matter of law, and to instruct the jury to find in favor of the defendant upon said plea, but the court then and there held and decided that the proof and evidence offered was not sufficient in law to support

said plea, and refused to give the jury a peremptory instruction to find for the defendant upon said plea; to which ruling of the court the defendant then and there excepted and now excepts;

Whereupon the court instructed the jury upon the law relating to the election of remedies as applicable to the facts hereinbefore set forth, which instruction is in words and figures following, to-wit:

If, however, you should find in favor of the Government upon this issue, that is, if you should find that the defendant falsely represented that he had resided upon the land, when as a matter of fact he had not, then it will be necessary for you to consider another defense, called the affirmative defense, set up for the defendant, and, briefly, I may say to you a little more fully what I have already referred to, and that is that on April 10, 1911, the Government commenced an action in this court setting forth substantially the same facts as are now set forth in the complaint in this case, except that in the first case the Government sought a different sort of relief, that is, it asked that the patent be set aside; it did not ask for damages. It was what is called an equity suit. Later on, on May 2, 1911, the record shows that an answer was filed by the defendant, in which he denied the charges of fraud, and further set forth that prior to the commencement of that suit he had transferred this land to divers persons, and the records of the county offered in evidence show that some at least, if not all, of the conveyances were of record, were of public record. On September 17, 1913, as

further shown by this record, upon motion of the then United States District Attorney, the suit was dismissed; decree was entered dismissing it, and providing that the plaintiff take nothing by reason of the suit. Now, as I have already explained to you, the Government had the right either to pursue that remedy or to pursue this. The contention of the defendant is that, having pursued that remedy, it is now barred from pursuing this, that having elected one of two remedies, it is bound by the result of that suit. There is a general principle of law that where one has two remedies, or two inconsistent remedies, if the person, being advised of his rights, and being aware of the facts, adopts one of those remedies, he cannot later pursue the other; he is limited to the one. So that I advise you in this case, and in the light of that general principle, that if you find that at the time the Government commenced that suit in equity, which was commenced on April 10, 1911, and at the time that it prosecuted it, it was aware of its rights, that the Government officers were aware of the rights of the Government, its legal rights, and was also aware of the facts as now disclosed, including the fact of the transfer of these lands by the defendant to third persons, then you may properly conclude that it is bound by the election of the remedy which it made in that suit, and it could not recover in this one.

The foregoing instruction was the only instruction upon the question of the election of remedies, and was all of the instructions of the court upon that question;



to which instruction the defendant then and there objected and excepted and now excepts;

The defendant objected to the said instruction for the reason that it failed to charge the jury in terms or in effect; that if the plaintiff on the 10th day of April, 1911, when it commenced the action in equity to cancel the patent described in the complaint in the case at bar, had full knowledge *or the means of knowledge* of all of the facts and of its rights in the matter then to be litigated, including the knowledge *or the means of knowledge* of the previous conveyance of all of said lands described in said patent, by the defendant, then the plaintiff would be bound by its election, and could not recover in this action;

And the defendant then and there requested the court to instruct the jury that if the plaintiff, on the 10th day of April, 1911, when the action in equity to cancel the patent in question was commenced, had full knowledge, *or the means of knowledge* of all of the facts and of its rights in the matter then to be litigated, including the knowledge *or the means of knowledge* of the previous conveyance of all of said lands described in said patent, by the defendant, and then elected to commence the said action in equity to cancel the said patent, it would be bound by such election and could not recover in this action for damages growing out of the same state of facts; which requested instruction the court refused, to which ruling of the court the defendant then and there excepted and now excepts.

Thereupon the said cause was submitted to the

jury and a verdict in favor of the plaintiff and against the defendant for the sum of Six Hundred Dollars, was returned, and a judgment thereon entered, to which verdict and judgment the defendant then and there excepted and now excepts.

SPECIFICATIONS OF PARTICULARS WHERE-  
IN THE EVIDENCE IS INSUFFICIENT TO  
SUPPORT THE VERDICT AND JUDGMENT.

The evidence is wholly insufficient to support the verdict and judgment in that upon the said question of the election of remedies the evidence was documentary, and it showed conclusively and without contradiction that the lands described in the patent which was sought to be cancelled by the action in equity filed the 10th day of April, 1911, had been conveyed by the defendant and his wife nearly six months before the said action in equity was commenced, and that all of said conveyances were of record in the office of the County Recorder of Bannock County, where said lands are situated; and the complaint alleges that all of said lands were conveyed for a valuable consideration and that the grantees named in said deeds went into immediate possession of said lands and still continue to hold the legal title thereto, which allegation is admitted by the answer; and therefore, the plaintiff had the means of knowledge of all of the facts including the conveyance of said lands by the defendant, at the time when the action in equity to cancel said patent was commenced; all of which facts or of record and undisputed, and was all of the evidence upon said issue.

PARTICULAR ERRORS OF LAW RELIED  
UPON.

1. The court erred in over-ruling the defendant's demurrer to the plaintiff's complaint;

2. The court erred in permitting the plaintiff to make any proof under said complaint for the reason that it failed to state facts sufficient to constitute a cause of action, or to entitle the plaintiff to any relief whatever;

3. The court erred in submitting to the jury the defendant's special plea in bar, growing out of the plaintiff's election of remedies;

4. The court erred in refusing to give to the jury a peremptory instruction to find for the defendant upon the said special plea in bar growing out of plaintiff's election of remedies;

5. The court erred in holding that defendant had failed to establish his second plea in bar of *res adjudicata*, and in failing and refusing to give the jury a peremptory instruction to find in favor of the defendant upon said plea of *res adjudicata*;

6. The court erred in its instruction to the jury upon the question of election of remedies;

7. The court erred in refusing to give the requested instruction to the jury upon said question of the election of remedies;

8. The court erred in entering judgment upon the verdict herein;

9. The court erred in refusing the petition of the defendant for a new trial, and to set aside the

verdict and judgment made and entered in this case.

I hereby certify that the within and foregoing is a true bill of exceptions in said cause, and the same is allowed as the defendant's bill of exceptions.

Dated this the 18th day of March, 1915.

FRANK S. DIETRICH,  
Judge of said Court.

Endorsed: Filed March 18, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

Refiled March 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

Upon the representation of counsel for the defendant that he desires to have the bill of exceptions settled and filed after the entry of judgment, it is ordered that the foregoing bill be, and the same is, hereby again allowed as the defendant's copy of exceptions, and the clerk is directed to re-file the same as of this date.

Dated this 26th day of March, 1915.

FRANK S. DIETRICH,  
Judge.

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*In the District Court of the United States, Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
JOSEPH B. BISTLINE,  
Defendant.



*Petition for Writ of Error.*

Now comes the defendant J. B. Bistline in the above entitled cause and says: That he feels himself aggrieved by the verdict of the jury herein and the judgment entered thereon, in favor of the plaintiff and against the said defendant, on the 24th day of March, 1915, in which said judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

*Wherefore*, defendant prays that a Writ of Error may be issued in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that the transcript of record, pleadings and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals; and that an Order be made fixing the amount of security which defendant shall furnish upon said Writ of Error, for costs and damages and to operate as a supersedeas bond.

THOS. F. TERRELL and

R. M. TERRELL,

Attorney for defendant; Residence, Pocatello, Idaho.

Service of the foregoing Petition admitted this the 13th day of April, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed, 13th day of April, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States, Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

*Assignment of Errors.*

J. B. Bistline, defendant in this action, in connection with and as a part of his petition for Writ of Error filed herein, makes the following assignment of errors, which he avers were committed by the trial court in the rendition of the judgment against this defendant appearing from the records herein, that is to say:

FIRST. The Court erred in overruling defendant's Demurrer to the plaintiff's Complaint, and in deciding that said Complaint stated facts sufficient to constitute a cause of action against the defendant.

SECOND. The Court erred in permitting the plaintiff to make any proof under said Complaint, for the reason that said Complaint failed to state facts sufficient to constitute a cause of action, or to entitle the plaintiff to any relief whatever.

THIRD. The Court erred in submitting to the jury the defendant's special plea in bar, growing out of plaintiff's election of remedies.

FOURTH. The Court erred in refusing to give to the jury a peremptory instruction to find for the

defendant upon its said special plea in bar, growing out of plaintiff's election of remedies.

FIFTH. The Court erred in holding and deciding that defendant had failed to establish his plea in bar of *res adjudicata* and in failing and refusing to give the jury a peremptory instruction to find in favor of the defendant upon said plea.

SIXTH. The Court erred in its instruction to the jury, upon the question of the election of remedies in failing to instruct the jury that *means of knowledge* of all the facts and its rights in the matters to be litigated would bind the plaintiff as fully as actual knowledge of such facts.

SEVENTH. The Court erred in refusing to give to the jury the defendant's requested instruction upon said question of the election of remedies to the effect that the *means of knowledge* of all the facts and rights to be litigated would bind the plaintiff, if, with such *means of knowledge*, the plaintiff should make an election of remedies then open to it.

EIGHTH. The evidence is insufficient to support the verdict and judgment in that upon said question of election of remedies the evidence is documentary, and without conflict, and showed that plaintiff had the *means of knowledge* of all the facts and its rights at the time it made its election of remedies.

NINTH. The Court erred in entering judgment upon said verdict in favor of the plaintiff and against the defendant, whereas judgment should have been rendered in favor of defendant and against plaintiff.

Wherefore, defendant prays that the said judgment may be reversed and that a judgment may be ordered in favor of the defendant.

JOSEPH B. BISTLINE,

Defendant.

By THOS. F. TERRELL,

Attorney for Defendant, Postoffice address, Pocatello, Idaho.

Service of the foregoing Assignment of Errors admitted, this the 13th day of April, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed, 13th day of April, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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*In the District Court of the United States, Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

*Order Allowing Writ of Error.*

On this the 13th day of April, 1915, came defendant by his attorney and filed herein and presented to the Court his petition praying for the allowance of a Writ of Error, and filed herein and presented an Assignment of Errors intended to be urged by



him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the said Writ of Error, upon the defendant's giving bond according to law in the sum of One Thousand and no-100 (\$1000.00) Dollars, which shall operate as a supersedeas bond.

FRANK S. DIETRICH,  
Judge.

Service of the foregoing Order Allowing Writ of Error, admitted this the 13th day of April, 1915.

J. L. McCLEAR,  
J. R. SMEAD,  
Attorneys for the Plaintiff.

Endorsed: Filed, 13th day of April, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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*In the District Court of the United States, Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOSEPH B. BISTLINE,  
Defendant.

*Bond on Writ of Error.*

*Know All Men by these Presents:* That Joseph B. Bistline as principal and W. F. Kasiska and E. C. White as sureties are held and firmly bound unto the United States of America, in the full and just sum of One Thousand and no-100 (\$1000.00) Dollars, to be paid to the said United States of America, its successors or assigns, for which payment well and truly to be made we bind ourselves, our heirs executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this the 8th day of April, 1915.

*Whereas*, lately at the March term of the District Court of the United States, within and for the District of Idaho, Eastern Division, in a suit pending in said Court, between the United States of America plaintiff and Joseph B. Bistline, defendant, judgment was rendered against said defendant, and said defendant has obtained a Writ of Error on said Court to reverse the judgment in said suit, and a citation directed to said plaintiff admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Joseph B. Bistline shall prosecute said Writ of Error to effect, and answer all damages and costs, if he shall fail to make good his plea, then

the above obligation to be void, otherwise to remain in full force and virtue.

Witness our hands and seals the day and year last above written.

JOSEPH B. BISTLINE, (Seal.)

J. B. BISTLINE, (Seal.)

W. F. KASISKA, (Seal.)

E. C. WHITE. (Seal.)

State of Idaho,

County of Bannock—ss.

W. F. Kasiska and E. C. White each being severally duly sworn deposes and says: That he is a surety whose name is subscribed to the within and foregoing Undertaking; that he is a resident and freeholder within the County of Bannock, State of Idaho; and that he is worth the sum specified in the within and foregoing Undertaking as the penalty thereof, over and above all his just debts and liabilities and exclusive of property exempt by law from execution.

W. F. KASISKA,

E. C. WHITE.

Subscribed and sworn to before me this the 8th day of April, 1915.

THOS. F. TERRELL,

(Seal.)

Notary Public.

We are satisfied with and accept the foregoing bond, and the sureties thereon as a sufficient bond on the Writ of Error allowed herein.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Approved this the 13th day of April, 1915.

DIETRICH,  
Judge.

Endorsed: Filed, 13th day of April, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

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*In the District Court of the United States, Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
JOSEPH B. BISTLINE,  
Defendant.

*Writ of Error.*

United States of America—ss.

*The President of the United States, to the Judges of  
the District Court of the United States for the  
District of Idaho, Eastern Division, Greeting:*

The cause, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court, before you, or one of you, between Joseph B. Bistline, plaintiff in error and the United States of America, defendant in error, a manifest error hath happened to the great damage of the said Joseph B. Bistline, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do com-



mand you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Judicial District, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, within Thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

*Witnesseth*, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 13th day of April, One Thousand Nine Hundred and Fifteen.

Issued at Boise, Idaho, with the seal of the United States District Court of the District of Idaho, and dated as aforesaid.

A. L. RICHARDSON,

Clerk of said United States District Court.

By Pearl E. Zanger, Deputy.

(Seal.)

Allowed by Frank S. Dietrich, Judge of said District Court.

Endorsed: Filed April 13, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

*Citation.*

*The President of the United States to The United States of America the plaintiff, and to C. H. Lingenfelter, Ex-United States Attorney, for the District of Idaho, and J. S. McClear, United States Attorney for the District of Idaho, and successor to the said C. H. Lingenfelter, Attorneys of record for said plaintiff, greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be held at the City of San Francisco, in the State of California, within Thirty (30) days from the date of this Writ, pursuant to a Writ of Error filed in the office of the Clerk of the District of Idaho, Eastern Division, wherein Joseph B. Bistline is plaintiff in error and you the said The United States of America is defendant in error, to show cause, if any there be, why the said judgment in the said Writ of Error, mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United

States Circuit Judge, this the 13th day of April, 1915.

FRANK S. DIETRICH,  
United States Circuit Judge.

Attest: A. L. Richardson, Clerk of said District Court. By Pearl E. Zanger, Deputy.

Service of the within Citation admitted, on this the 13th day of April, 1915.

J. L. McCLEAR,  
J. R. SMEAD,  
Attorneys for Defendant in error.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto related, be transmitted to the said United States Circuit Court of Appeals, for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest: A. L. RICHARDSON, Clerk.

(Seal.) By Pearl E. Zanger, Deputy.

Endorsed: Filed April 13, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOSEPH B. BISTLINE,  
Defendant.

*Stipulation for Record on Return of Writ of Error.*

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause through their Attorneys of record, that the following

*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH B. BISTLINE,

Defendant.

*Citation.*

*The President of the United States to The United States of America the plaintiff, and to C. H. Lingenfelter, Ex-United States Attorney, for the District of Idaho, and J. S. McClear, United States Attorney for the District of Idaho, and successor to the said C. H. Lingenfelter, Attorneys of record for said plaintiff, greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be held at the City of San Francisco, in the State of California within Thirty (30) days of

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where *Joseph B. Bistline* is plaintiff in error and you the said The United States of America is defendant in error, to show cause, if any there be, why the said judgment in the said Writ of Error, mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United



States Circuit Judge, this the 13th day of April, 1915.

FRANK S. DIETRICH,  
United States Circuit Judge.

Attest: A. L. Richardson, Clerk of said District Court. By Pearl E. Zanger, Deputy.

Service of the within Citation admitted, on this the 13th day of April, 1915.

J. L. McCLEAR,  
J. R. SMEAD,  
Attorneys for Defendant in error.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto related, be transmitted to the said United States Circuit Court of Appeals, for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest: A. L. RICHARDSON, Clerk.  
(Seal.) By Pearl E. Zanger, Deputy.

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOSEPH B. BISTLINE,  
Defendant.

*Stipulation for Record on Return of Writ of Error.*

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause through their Attorneys of record, that the following

*Clerk's Certificate to Transcript of Record.*

I, A. L. Richardson, Clerk of the District Court, of the United States, in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from One to ...*74*..., inclusive, contain true and correct copies of the Complaint Action at Law, Demurrer to Complaint, Order over ruling Demurrer to Complaint, Answer, Order allowing Defendant to file Amendment to Answer, Amendment to Answer, Motion to Strike, Order Denying Plaintiff's Motion to Strike, Verdict of the Jury, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation on Writ of Error, Return to Writ of Error, Certificate of Clerk, in the above entitled cause, which constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the costs of the record herein amounts to the sum of \$*90.70*, and that the same has been paid by the plaintiff in error.

*Witness*, my hand and the seal of said District Court, affixed at Boise, Idaho, this the *7th* day of April, 1915.

A. L. RICHARDSON,  
Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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J. B. BISTLINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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**BRIEF FOR PLAINTIFF IN ERROR.**

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Filed

SEP 15 1915

F. D. Monckton,  
Clerk.

TERRELL & TERRELL,  
Attorneys for Plaintiff in Error.  
Residence, Pocatello, Idaho.





*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

J. B. BISTLINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Brief for Plaintiff in Error.**

**STATEMENT OF THE CASE.**

On the 30th day of June, 1906, the defendant in error, United States of America, executed, delivered and issued to the plaintiff in error, Joseph B. Bistline, a patent to certain public lands of the said United States, under the Public Land Laws relating to homesteads (Trans., pp. 10, 20, 40).

About four years after receiving this patent, to wit, September 20th, November 1st and November 4th, 1910, plaintiff in error conveyed all of the lands covered by said patent to divers persons, for valuable considerations, and the grantees named in such conveyances went into immediate possession of their respective tracts, which conveyances were, on or about their respective dates, duly recorded in the office of the County Recorder of Banock County, State of Idaho, in accordance with the laws of the State of Idaho, and conveyed all of the land described in said patent (Trans., p. 34).

On the 19th day of April, 1911, after the lands described in said patent had been conveyed as aforesaid and such conveyances recorded, the defendant in

error, United States of America, commenced a suit in equity for the cancellation of said patent, alleging as a cause of action the identical state of facts which is alleged as the cause of action at bar (Trans., pp. 35-51).

Plaintiff in error answered in said suit, denying all material allegations of the bill (Trans., pp. 43-51).

Replication was filed and served September 17th, 1913 (page 52).

Upon the issue thus joined in said suit in equity, a decree was duly made and entered on the 17th day of September, 1913, adjudging and decreeing that the said suit be dismissed absolutely, unconditionally and without reservation, and that plaintiff take nothing by said action (Trans., p. 53).

Thereafter, on the 17th day of September, 1913, the defendant in error commenced this *action at law* for damages based upon the identical state of facts alleged in the suit in equity to cancel said patent aforesaid, covering the identical lands described in said former suit in equity to cancel said patent (Trans., pp. 5-12).

To the complaint in said action at law, the defendant (plaintiff in error), on the 3d day of October, 1913, filed his demurrer, one of the grounds of said demurrer being that said complaint fails to state facts sufficient to constitute a cause of action (Trans., pp. 12, 13).

This demurrer was, on the 31st day of January, 1915, overruled by the Trial Court (Trans., pp. 13, 14).

Thereafter, on the 21st day of February, 1914, the plaintiff in error answered unto said complaint denying the charges of fraud (Trans., pp. 14-22).

Thereafter, by leave of Court first had and obtained, on the 9th day of March, 1914, plaintiff in error filed his amendment to his said answer, setting forth two affirmative defenses by way of pleas in bar, to wit:

1. That the facts alleged in said complaint in said action at law, to recover damages, have been once adjudicated and finally determined on the merits; and,

2. That the defendant in error had, by commencing and maintaining his said suit in equity to cancel said patent, made an election between two inconsistent remedies, then open to the defendant in error's choice and was bound by such election (Trans., pp. 24-28).

Defendant in error, on the 10th day of March, 1914, moved to strike the said amendment to answer, setting forth said affirmative defenses from the files of said action, on the grounds that said affirmative matters alleged are irrelevant and immaterial (Trans., p. 29).

The said motion was denied (Trans., p. 30).

Upon the issues joined by the complaint and answer as amended, the cause proceeded to trial on the 16th day of March, 1915, and a verdict returned in favor of the defendant in error, for the sum of six hundred and no/100 (\$600.00) dollars, upon which verdict judgment was thereafter, on the 24th day of March, 1915, entered (Trans., pp. 30-32).

At the commencement of said trial and before any testimony was given, the plaintiff in error objected to the first testimony offered, and to any testimony in the trial of said cause, on the ground that said complaint failed to state facts sufficient to constitute a cause of action or any part of a cause of action, or to entitle the defendant to any relief whatever, which objection was by the Court overruled, to which ruling the plaintiff in error then and there excepted, which exception is incorporated in the Bill of Exceptions herein (Trans., pp. 33, 34).

Defendant in error was then permitted to offer testimony in proof of the allegations of said complaint, and among other testimony offered by and received on behalf of defendant in error were three certain deeds made, executed and delivered by the plaintiff in error, Joseph B. Bistline, and his wife, Grace Bistline, to the persons and of the dates and acreage as follows:

To Joseph H. Tolman, Jr., November 4th, 1910,  
eighty (80) acres;

To Henry Caribo and Samuel Blook, September 20th,  
1910, forty (40) acres;

To Henry S. Woodland, November 1st, 1910, forty  
(40) acres.

That all of said deeds of conveyance were duly executed and delivered, for valuable consideration; and the grantees therein named went into immediate possession of said respective tracts thereunder, which conveyances covered and conveyed all of the lands described in said patent, and each of said deeds were on or about their respective dates duly recorded in the



office of the County Recorder of Bannock County, State of Idaho, in accordance with the laws of said State (Trans., pp. 33-35).

Thereupon the defendant in error rested its case and the plaintiff in error offered in evidence the said Bill in Equity, to cancel said patent hereinbefore referred to, with the answer thereto, and the replication to said answer, and the decree of said court upon the issues thus joined, in support of his special pleas in bar of *res adjudicata*, and the election of remedies, the said bill, answer, replication and decree being incorporated in said Bill of Exceptions (Trans., pp. 35-53).

Plaintiff in error relied upon his said special pleas in bar and with this evidence rested (Trans., p. 54).

Whereupon the plaintiff in error requested the Trial Court to pass upon and decide as to the sufficiency of said proof in support of his special plea, of the previous election of remedies, as a matter of law, and to instruct the jury to find for the plaintiff in error upon said plea; but the Court refused to pass upon the sufficiency of the evidence in support of said plea and refused to give the jury a peremptory instruction to find for the plaintiff in error upon said plea, and held that the Court would submit the evidence under said plea to the jury under proper instructions; to which ruling of the Court the plaintiff in error then and there excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., p. 54).

Thereupon the plaintiff in error requested the Court to pass upon and decide as to the sufficiency

of the proof in support of his special plea of *res adjudicata*, as a matter of law, and to instruct the jury to find in favor of the plaintiff in error upon said plea, but the Court then and there held and decided that the proof and evidence offered was not sufficient in law to support said plea, and refused to give the jury peremptory instruction to find for the defendant upon said plea and denied said plea; to which ruling of the Court the plaintiff in error then and there excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., pp. 54, 55).

The Court then instructed the jury upon the law relating to the election of remedies as applicable to the facts of the case, which was the only instruction and all of the instructions upon said question; to which instruction the plaintiff in error then and there objected and excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., pp. 55-57).

The defendant in error then and there requested the Court to give his instruction, set forth on page 57 of the Transcript, which requested instruction the Court refused, to which ruling the plaintiff in error then and there excepted, which exception is incorporated in the said Bill of Exceptions.

From the foregoing statement of facts, the plaintiff in error makes the following assignment of errors:

### SPECIFICATIONS OF ERRORS.

#### First.

The Court erred in overruling the plaintiff in error's demurrer to the defendant in error's complaint

and in deciding that said complaint stated facts sufficient to constitute a cause of action against the plaintiff in error.

### Second.

The Court erred in permitting the defendant in error to make any proof under said complaint, for the reason that said complaint failed to state facts sufficient to constitute a cause of action or to entitle the defendant in error to any relief whatever.

### Third.

The Court erred in submitting to the jury the evidence of the plaintiff in error's special plea in bar, growing out of the defendant in error's election of remedies.

### Fourth.

The Court erred in refusing to give to the jury a peremptory instruction to find for the plaintiff in error upon his said special plea in bar, growing out of the election remedies by the defendant in error.

### Fifth.

The Court erred in its instruction to the jury upon the question of the election of remedies in failing to instruct the jury that *means of knowledge* of all of the facts and rights in the matters to be litigated would bind the defendant in error as fully as actual knowledge of such facts, and in giving to the jury the following instruction, to wit:

"If, however, you should find in favor of the Government upon this issue, that is, if you should find that the defendant falsely represented that he had resided upon the land, when as a matter of fact he had not, then it will be necessary for you to consider

another defense, called the affirmative defense, set up for the defendant, and briefly, I may say to you a little more fully what I have already referred to, and that is that on April 10, 1911, the Government commenced an action in this court setting forth substantially the same facts as are now set forth in the complaint in this case, except that in the first case the Government sought a **different sort of relief**, that is, it asked that the patent be set aside; it did not ask for damages. It was what is called an equity suit. Later on, on May 2, 1911, the record shows that an answer was filed by the defendant, in which he denied the charges of fraud and further set forth that prior to the commencement of that suit he had transferred this land to divers persons, and the records of the county offered in evidence show that some at least, if not all, of the conveyances were of record—were of public record. On September 17, 1913, as further shown by this record, upon motion of the then United States District Attorney, the suit was dismissed; decree was entered dismissing it, and providing that the plaintiff take nothing by reason of the suit. Now, as I have already explained to you, the Government had the right either to pursue that remedy or to pursue this. The contention of the defendant is that, having pursued that remedy, it is now barred from pursuing this, that having elected one of two remedies, it is bound by the result of that suit. There is a general principle of law that where one has two remedies, or two inconsistent remedies, if the person, being advised of his rights, and being aware of the facts, adopts one of those remedies, he cannot



later pursue the other; he is limited to the one. So that I advise you in this case, and in the light of that general principle, that if you find that at the time the Government commenced that suit in equity, which was commenced on April 10, 1911, and at the time that it prosecuted it, it was aware of its rights, that the Government officers were aware of the rights of the Government, its legal rights, and was also aware of the facts as now disclosed, including the fact of the transfer of these lands by the defendant to third persons, then you may properly conclude that it is bound by the election of the remedy which it made in that suit, and it could not recover in this one."

#### Sixth.

The Court erred in refusing to give the requested instruction to the jury of the plaintiff in error upon said question of the election of remedies, to the effect that the *means of knowledge* of all of the facts and rights to be litigated would bind the defendant in error, if with such *means of knowledge* the defendant in error should make an election of remedies then open to it, and particularly in refusing to give the following instruction, to wit:

"If the plaintiff, on the 10th day of April, 1911, when the action in equity to cancel the patent in question was commenced, had full knowledge, or the *means of knowledge* of the facts and of its rights in the matter then to be litigated, including the knowledge or the *means of knowledge* of the previous conveyance of all of said lands described in said patent by the defendant, and then elected to commence the said action in equity to cancel said patent, it would

be bound by such election and could not recover in this action for damages, growing out of the same state of facts."

#### Seventh.

The evidence is not sufficient to support the verdict and judgment herein in this, that upon said question of election of remedies the evidence is documentary and without conflict, showing that the defendant in error had the *means of knowledge* of all of the facts and of its rights and of the conveyance of all of said lands by the plaintiff in error, at the time it made its election of remedies.

#### Eighth.

The Court erred in holding and deciding that the plaintiff in error had failed to establish his plea in bar of *res adjudicata* and in failing and refusing to give the jury a peremptory instruction to find in favor of the plaintiff in error upon said plea, the evidence of such plea, being documentary and without conflict, showing conclusively that the issues involved in the action at bar had previously, at the commencement of this action, been determined by judgment duly made and given.

#### Ninth.

The Court erred in entering judgment upon said verdict in favor of the defendant in error and against the plaintiff in error, whereas judgment should have been rendered in favor of the plaintiff in error and against the defendant in error, dismissing the complaint.

#### ARGUMENT.

The questions of law raised by the foregoing speci-

fications of error may be conveniently discussed and presented under three general heads, viz.: The sufficiency of the complaint. Was there an election of remedies? And had the matters at bar been previously adjudicated? We will present these questions in the order named.

### SUFFICIENCY OF COMPLAINT.

Assignments of error 1 and 2 raise the one question, viz.: Do the facts alleged in the complaint constitute a cause of action?

It is alleged in paragraph 6 of said complaint (Trans., p. 10), that the defendant in error, through its proper officers, "issued and delivered to the said Joseph B. Bistline the complainant's patent *dated June 30th, 1906*, conveying to the said Joseph B. Bistline *the legal title* to said land."

This action was commenced more than *seven years later*, to wit, on *17th day of September, 1913*.

It is therefore our contention that at the end of six years from the date of the issuance of the patent, the equitable title to the lands conveyed by said patent became invested in the patentee, so that as against the defendant in error he held both the legal and equitable title. In other words, that at the end of the six-year period, the title of the plaintiff in error became absolute, unconditional and indefeasible as to the defendant in error, and cannot be assailed directly or indirectly for the fraud of the patentee or the fraud of the public land officers.

We are not pleading nor relying upon the statutes of limitations as a direct and specific defense to this action, but from the authorities hereinafter pre-

sented we believe that it is a material element entering into the question as to whether or not the complaint states a cause of action, and for that reason we call attention to section 8 of an act of Congress approved March 3, 1891, chapter 561, 26 Stats. L. 1093, Fed. Stat. Annotated, vol. 6, page 526, in this language:

“That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and *suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.*”

Therefore, at the time of the commencement of the suit at bar, an action to cancel or annul the patent described in the complaint could not have been maintained, for the reason that more than *seven years* had elapsed since the date of the issuance of the patent in question.

When the United States issued the patent to the lands in question, it parted with the legal title only. It is so alleged in the complaint. When the six-year period had elapsed after the date of the issuance of the patent, then the patentee was not only invested with the legal title but also the *equitable title* to the lands covered by the patent as against the United States.

It is true that ordinarily statutes of limitation only affect the remedy, but in actions where the title to land is involved, such statutes not only bar the remedy but extinguish the right and vest a perfect title



in the adverse holder.

The Federal Courts have considered this question many times, and we here present some of the leading authorities, quoting from the decisions the matter in point.

“Statutes of limitation give a *vested right* in real property which cannot be taken away without due process of law. These statutes operate to *transfer the title from one person to another.*”

N. P. R. R. Co. vs. Ely, 197 U. S. 1.

Toltec Ranch Co. vs. Cook, 191 U. S. 532.

“The lapse of time limited by the statutes, specifying the time in which suits must be commenced for the recovery of lands sold for taxes, not only bars the remedy, but *extinguishes the right and vests a perfect title in the adverse holder*”

Leffingwell vs. Warren, 2 Black (U. S.), 599.

Davis vs. Mills, 194 U. S. 457.

Campbell vs. Holt, 115 U. S. 623.

Arrington vs. Liscomb, 34 Cal. 365-383.

In construing the identical statute hereinbefore quoted (sec. 8, Statutes at Large, 1093), the Supreme Court of the United States in the case of the United States vs. Chandler-Dunbar Co., 209 U. S., page 447, says:

“In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land at least, which cannot escape from the jurisdiction, generally are held to *affect the*

*right*, even if in terms only directed against the remedy.”

Citing, *Leffingwell vs. Warren*, 2 Black (U. S.), 599–605.

*Sharon vs. Tucker*, 144 U. S. 533.

*Davis vs. Mills*, 194 U. S. 451–457.

And the Court in further discussing this question, says:

“This statute (sec. 8, 26 Stat. L. 1093) must be taken to mean that the patent is to be held good, and *is to have the same effect against the United States that it would have had if it had been valid in the first place.*”

In other words, after the lapse of six years, the patent charged with fraud by the complaint in the action at bar is just as good and just as valid as if it were based upon the best final proof ever submitted to the Land Department of the United States—just as good as if there was not the slightest suspicion of fraud attached to it.

If this conclusion is correct, then the allegations of fraud contained in the complaint are wholly immaterial and redundant, and should not be considered, without which there is not the semblance of a cause of action stated.

We are not content to rest the discussion upon the cases cited. We think the case of *United States vs. Winona R. R. Co.*, 165 U. S. 463, is strictly in point upon the question under consideration. In passing upon the statute above mentioned, and in discussing the nature and character of the title ac-

quired by a patentee after the lapse of the statutory period, the Court says:

“In other words, it [United States] has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitation; that when its proper officers acting in the ordinary course of their duty, have conveyed away land which belonged to the Government, such conveyance should, *after the lapse of the prescribed time, be conclusive against the Government*, and this notwithstanding any errors, irregularities or improper action of its officers therein. Thus in the act of 1891 (26 Stat. 1093), it is provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter issued, suits should only be brought within six years after the date of issue. *Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the fraud or misrepresentation of the patentee were, the patent would become conclusive as a transfer of the title*, providing only that the land was public land of the United States and open for sale and conveyance through the land department.”

Taking the allegation of the complaint to be true that the patent therein mentioned and charged to have been fraudulently obtained was issued *June 30th, 1906*, and it further appearing that the action at bar was not commenced until the *17th day of*

September, 1913, what is the effect of those facts upon the alleged cause of action in the case at bar?

The Supreme Court of the United States in the case of United States vs. Chandler-Dunbar Co., *supra*, says that such facts have "*the same effect against the United States that it would have had if the patent had been valid in the first place.*"

The Supreme Court of the United States in the case of United States vs. Winona R. R. Co., *supra*, says the title of plaintiff in error to the land in question under the patent alleged in the complaint is *conclusive against the Government, and it would matter not what the fraud or misrepresentations of the patentee were.* What does the Court mean when it says that, "*It would matter not what the fraud or misrepresentations of the patentee were?*" Do they not mean that after the statute has run this question of fraud is wholly immaterial in any action assailing the regularity of the issue of the patent?

The same Court in the same case also says that *such a conveyance, after the lapse of the prescribed time, is conclusive against the Government;* but if the defendant in error is permitted to maintain this action, *is the Government concluded?*

The complaint alleges fraud on the part of the plaintiff in error in procuring the patent, but if "*it matters not what the fraud or misrepresentations of the patentee were,*" are the allegations of fraud in the complaint material? If the allegations of fraud are eliminated, there is no cause of action stated.

From the authorities cited it would appear that the title of the plaintiff in error to the lands described in said patent were, at the time of the com-



mencement of this action, absolute, perfect, unconditional and indefeasible—just as good and valid, as “*it would have been had it been valid in the first place*”; and if this be true, we respectfully inquire, how can the acquisition of such a title be made the basis of an action for damages in acquiring such title? How can damages be predicated upon the acquisition of a title which in itself is absolutely perfect?

If the theory of the defendant in error, upon which this action is prosecuted, shall be upheld, the statute of limitation and the decisions of the courts in construing that statute must be abrogated and ignored. This Court will do indirectly that which is forbidden by the statute to be done directly. The title of the plaintiff in error will not be perfect, nor absolute, nor conclusive against the Government, but will be open to attack in all the years to come, on the grounds of the fraud of the patentee, and if the fraud be proved, damages recovered equal to the value of the land. The value of land and all other commodities is measured in money. If the value of the land measured in money under the name of damages can be taken from the patentee, after the statute of limitation has run, of what benefit to the patentee is this “benign” statute referred to in the case of *United States vs. Winona R. R. Co., supra*? This “benign” statute is a delusion and a snare. An action against a patentee for procuring a patent by misrepresentations and fraud may be maintained under the *alias* of an action for damages at any time within a century, and the equivalent of the land described in the

patent taken from him in money. In other words, the defendant in error contends by his complaint, that while you cannot take the land itself, you may take the equivalent of the land. Things that are equal to the same thing are equal to each other, and we think the position of the defendant in error is wholly untenable. It is an appeal to the courts to accomplish indirectly that which cannot be done directly. It has the appearance of subterfuge, a shift, a device, a trick, to reach an end regardless of the means, and we do not believe the United States or the courts will take such a position.

In the case of *United States vs. California Land Co.*, 192 U. S. 355, upon the question of the *bona fides* of the United States in maintaining actions, the Court says:

“It would be inconsistent with the good faith of the United States to attribute to it the intent *to keep a concealed weapon* in reserve in case its suit should fail.”

And in this case we think it inconsistent with the good faith of the United States to permit the statute of limitation to run against a patent of its lands, the title to which has become absolute, conclusive and perfect by its own laches, then to attack the regularity of the issue of such patent on the ground of fraud under the mask of damages.

If this action had been commenced within six years after the issuance of patent, there is no doubt that the facts alleged would constitute a cause of action, for the title of the patentee would not have been perfect nor conclusive against the government, but

would be open to attack in an action to cancel the patent or an action for damages, at the election of the Government.

### ELECTION OF REMEDIES.

Under this general head we will present the third fourth, fifth, sixth, seventh and ninth specifications of error. Does the record here show that defendant in error, prior to the commencement of this action, made an election of remedies by which it was bound and which would bar the maintenance of this action.

Briefly stated, this record shows that on the 10th day of April, 1911, defendant in error commenced its action to cancel the identical patent described in the complaint in the case at bar, involving the identical land, and upon the identical charges of fraud in procuring the patent (Trans., pp. 36-42). Issue was joined (Trans., pp. 43-52). A decree upon the merits of the issues joined was duly made and given on the 17th day of September, 1913, adjudging that this defendant in error take nothing by that suit and that it be dismissed (Trans., p. 53).

This record further shows that this plaintiff in error, the patentee named in said patent, and his wife, Grace Bistline, on the 4th day of November, 1910, conveyed eighty acres of the land described in said patent to Joseph H. Tolman, and on the 20th day of September, 1910, conveyed forty acres to Henry Caribo and Samuel Bloom, and on the 1st day of November, 1910, conveyed forty acres to Henry S. Woodland, the said conveyances covering all of the land described in said patent, which conveyances were duly executed for valuable considerations, and

the grantees therein named *immediately went into possession of their respective tracts* under such conveyances; and that said deeds on or about their respective dates were *each duly recorded in the office of the County Recorder of Bannock County, State of Idaho*, in accordance with the laws of said state (Trans., pp. 34, 35).

There can be no controversy about the general proposition that in case title to public lands has been divested through fraud, the Government may either bring suit to cancel the patent, or, *at its option*, maintain an action in damages to recover from the wrongdoer the value of the land, if the action chosen is brought within the proper time.

Vol. 1, Bigelow on Fraud, p. 63.

Vol. 2, Cooley on Torts (3 ed.), p. 165.

United States vs. Minor, 114 U. S. 223-239.

Southern Pac. Ry. Co. vs. United States,  
200 U. S. 341.

“The doctrine of election means that where two inconsistent remedies are presented to the choice of a party, by a person who manifests a clear intention that he should not enjoy both, he must accept the one and reject the other.”

Peters vs. Bain, 133 U. S. 670.

In re Kenyon et al., 156 Fed. 863.

15 Cyc., pp. 257, 258, and cases cited.

“By a preponderance of authority, the mere commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain the same, is such a decisive act as constitutes a conclusive election, barring subse-



quent prosecution of inconsistent remedial rights."

15 Cyc., pp. 259, 260, and cases cited.

Klipstein vs. Grant, 141 Fed. Rep. 72.

Newell vs. Young, 109 Pac. 801.

"The *commencement* of the action and *not the result* of the action determines the election of remedies."

In re Garver, 68 N. E. Rep. 667.

"An election once made, with knowledge of the facts, between co-existing remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of the intent, and it constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."

15 Cyc. 262, 263, and cases cited.

Wettenberger vs. Hall, 110 Pac. 911.

Smith vs. Gray, 100 Pac. 339.

Davis vs. Schmidt, 106 N. W. 119.

Wright vs. Dudgeon, 116 N. W. 598.

Ulrich vs. Bigger, 106 Pac. 1073.

Madison Stock Co. vs. Osler, 102 Pac. 325.

Penderson vs. Christopherson, 106 N. W. 958.

Kuhnes vs. Cahill, 104 N. W. 1025.

Bracton vs. Atl. Trust Co., 60 N. E. 772.

The Supreme Court of the United States in considering this question in the case of Robb vs. Vox, 155 U. S. 13, quotes with approval the rule adhered

to by the Michigan Supreme Court, and at page 40 of the opinion says:

“A party may not take contradictory positions; and when he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or *means of knowledge* of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.”

The quotation last above made is again quoted with approval in the case of Klipstein & Co. vs. Grant, 141 Fed. Rep., by the Circuit Court of Appeals for the Fifth Circuit.

It is also approved as the law in the case of Bacon & Co. vs. Moody, 117 Ga. 207, 43 S. E. 482.

See, also, Standard Varnish Co. vs. Haydock, 143 Fed. Rep. 318.

Stewart vs. Hayden, 169 U. S. 1.

Van Winkle vs. Croswell, 146 U. S. 42.

It was our contention at the trial, and we still insist, that an election of remedies made with knowledge of the facts, or *the means of knowledge of all the facts*, is binding upon the parties. The *means of knowledge* within the command of the party and by him ignored is as effectual in binding him to an election as if he had actual knowledge. We think constructive notice of the facts would be sufficient. Certainly common prudence would require any person contemplating an action when he was required to make an election to examine the public records

affecting the matters involved.

The defendant in error had full knowledge of all of the alleged fraud, as the allegations in the suit to cancel the patent are the same as in the case at bar. At the time it commenced the action to cancel said patent, it also had the means of knowledge of the conveyance of the lands described in the patent to divers persons by the patentee, for the reason that such deeds of conveyance were at that time of record in the office of the County Recorder of the county where the lands were situated. Not only that, but the purchasers of these lands, at the time said action to cancel said patent was commenced, were in actual possession of the lands purchased by them respectively (Trans., p. 34). It seems to us that an absolute duty rested on the defendant in error to ascertain from the records of the county if the lands described in the patent had been conveyed by the patentee, and to ascertain from a visit to the land if it was occupied or claimed by any other person. A failure to do this is inexcusable, and charges the defendant in error with the same knowledge which he might have had upon a most casual investigation or inquiry. The defendant in error ought not to be permitted to have advantage of its own laches, its own wrong; nor be heard to say that it had no knowledge of these conveyances when it commenced the action to cancel said patent, when said conveyances were of record in the public records of the county where the lands are situated, and the purchaser residing upon and in actual possession of said lands. In paragraph 7 of the complaint in the case at bar,

defendant in error alleges the facts of these conveyances (Trans., p. 10). It had the same *means of knowledge* of these facts on the 10th day of April, 1911, when it commenced the suit to cancel the patent, as it did on the 17th day of September, 1913, when it commenced the suit at bar, for these conveyances were all of record and had been of record since September and November, 1910. It seems to us that defendant in error ought to be bound by the *means of knowledge* at its command, in making its election of remedies.

Notwithstanding the fact that the evidence in support of this plea was entirely documentary and absolutely without conflict or contradiction, the Trial Court refused to pass upon the sufficiency of the evidence in support of the plea, as a matter of law, and refused to instruct the jury to find for the plaintiff in error upon said plea, and submitted the said plea to the jury (Trans., p. 54). These rulings of the Court we urge in specifications of error 3 and 4 to be error. If there was no issue of fact, and no conflict in the evidence, as to whether the plea was sufficient is purely a question of law, and it was prejudicial to the plaintiff in error to submit that question to the jury. The ordinary jury is wholly unprepared and unfitted to pass upon such a question.

Then the Court instructed the jury upon this question as set out in the fifth specification of error, and refused to give the jury the instructions upon this plea set out in the sixth specification of error. This brings us back to the question of law as to whether



or not the *means of knowledge* of all of the facts at the time of the election is sufficient to charge the party making such election, or, does it require actual knowledge? We believe that *means of knowledge* is sufficient. This position is clearly supported by the authorities cited. Were this not the correct rule, persons having dual remedies would purposely abstain from making ordinary investigation and inquiry as to certain facts bearing upon his case, so that if he was defeated *in his first action*, he might be excused from his election and thereby gain the opportunity to have another trial of his case upon the same facts. The Trial Court by the giving and refusing of said instructions held as a matter of law that actual knowledge of all the facts was indispensable, and that even though the *means of knowledge* was at the command of the person making the election, unless he availed himself of such *means of knowledge* and acquired actual knowledge, the plea could not obtain.

The seventh and ninth specifications of error raise the questions that the verdict is not supported by the evidence and the judgment should have been for the plaintiff in error, for the reasons heretofore stated, that the evidence was entirely documentary and without conflict, and showed conclusively that the defendant in error had the knowledge or the means of knowledge of all of the facts bearing upon the controversy at the time when it commenced its suit in equity to cancel the patent in question, and having such knowledge and means of knowledge of all the facts, by commencing such suit in equity to cancel said patent, it made an election of remedies

by which it became bound, which is a bar to the maintenance of this action to recover damages based upon the same state of facts.

### RES ADJUDICATA.

It will be observed from reading the answer as amended to the complaint herein that there is not only an *election of remedies* pleaded as a bar to this action, but it is also pleaded that the judgment entered on the 17th day of September, 1913, dismissing the suit in equity to cancel the patent heretofore mentioned, is a complete adjudication on the merits of the controversy and *res adjudicata* as to the matters involved in this action.

The record of the suit in equity including said judgment was received in evidence for this purpose (Trans., pp. 36-53).

The Trial Court held as a matter of law that the proof and evidence aforesaid was not sufficient to support the plea and dismissed the same, to which ruling the plaintiff excepted (Trans., pp. 54, 55).

This ruling is assigned as error and presented by specifications of error 8 and 9.

There is a well-defined distinction between the two special defenses submitted. An election of remedies exists only where there are two inconsistent remedies available to a party, one of which is chosen. Any distinct act constitutes an election. It is not necessary in order to constitute an election that a final judgment or any judgment shall be entered so as to bar another action. It is the election that constitutes the bar.

On the other hand, in order that the plea of *res*

*adjudicata* may be available as a defense, it is necessary that a final judgment upon the merits of the controversy shall have been entered so as to bar a second action. So far as the defense is concerned, there may have been only one remedy in the first instance, and yet if such remedy was pursued to a final judgment upon the merits, a determination of the action upon the merits would be a bar to any subsequent action based upon the same facts.

Coming now to the evidence in the case at bar, the record here shows by a comparison of the said bill in equity to cancel said patent (Trans., pp. 36-42) with the complaint in this action (Trans., pp. 5-12) that the material facts alleged as a cause of action are identical; that the patent involved is the same; that the lands are the same; that the parties are the same; that the acts of fraud charged are the same; and the only difference is the prayer for relief—one demands cancellation, the other damages.

Upon said bill in equity to cancel said patent, issue was joined and before the commencement of this action, to wit, on the 17th day of September, 1913, a decree in equity was duly made and given adjudging that the complainant in said bill take nothing thereby and that said bill be dismissed. There are no reservations, conditions or limitations whatever in the decree or in the record. The decree recites that said "cause came regularly on for trial," and so far as the record shows the trial may have been upon evidence submitted which was found to be insufficient or unworthy (Trans., p. 53).

We respectfully submit that all presumptions of

the law are in favor of this judgment. It certainly ought to be given full faith and credit for what it appears to be upon its face, and to the facts therein contained. It says in terms that the cause came regularly on for trial, and it is adjudged that complainant take nothing by the bill and that the same be dismissed. How could a judgment of dismissal be more perfect? What could be added to make it more effective?

We especially call attention to the fact that this record in the equity suit was all of the evidence upon the plea of *res adjudicata*. The record was not assailed in any particular. The judgment was not attacked in any manner. There was no explanation or extenuation offered or claimed. The record in the equity suit stands as the only evidence unexplained and unimpeached. It is for the Court to say what effect will be given to it as it appears in this record.

There can be no doubt upon the general proposition of law that the dismissal of a suit by the plaintiff, when such dismissal is upon the merits of the controversy, is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case.

Durant vs. Essex Co., 7 Wall. (U. S.) 107.

Parish vs. Ferris, 2 Black. (U. S.) 606.

Lyon vs. Perin, 125 U. S. 698.

But let us examine the authorities bearing more directly upon the decree relied on in the case at bar. In the case of Baker vs. Cummins, 181 U. S. 117, the syllabus states the rule as follows:



“A general dismissal on the merits of a bill in equity, not made conditionally, or without prejudice, or with any saving of the rights of the action, will constitute a bar to the use of the cause of action there involved as a setoff in a subsequent action at law between the same parties.”

Lyon vs. Perin, 125 U. S. 698.

Waldron vs. Bodley, 14 Pet. (U. S.) 156-161.

Durant vs. Essex Co., 7 Wall. (U. S.) 107.

Quoting from the third syllabus in the case of Lyon vs. Perin, 125 U. S. 698, the rule is stated as follows:

“Where words of qualification such as ‘without prejudice’ or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, *it is presumed to be rendered on the merits.*”

In the case of Hubbell vs. United States, 171 U. S. 203, the Court states the proposition that a suit cannot be brought upon a certain state of facts, and, after the dismissal of the action, another suit brought against the same party upon the same state of facts and recover upon a different theory. The judgment is an estoppel, in favor of the successful party in any subsequent action on the same state of facts.

This general proposition is supported by many authorities:

Bradley vs. Eagle Mfg. Co., 57 Fed. 989.

Cromwell vs. County of Sac, 94 U. S. 351.

Campbell vs. Rankin, 99 U. S. 261-263.

Block vs. Commissioners, 99 U. S. 686-693.

Wilson vs. Dean, 121 U. S. 525-532.

Bissell vs. Spring Valley Tp., 124 U. S. 225-231.

Nesbitt vs. Independent District, 144 U. S. 610-618.

R. R. Co. vs. Alsbrook, 146 U. S. 279-302.

McComb vs. Frink, 149 U. S. 629.

Werlein vs. New Orleans, 177 U. S. 390.

U. S. vs. California Land Co., 192.

“A judgment between the same parties in which a claim of plaintiff is decided, or was properly involved and might have been there presented and determined, is a bar to another action for the same cause. The neglect of the plaintiff to avail himself of it furnishes no reason for another litigation.”

Stockton vs. Ford, 59 U. S. 419.

“When a second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first.”

Dowell vs. Applegate, 152 U. S. 327.

Cromwell vs. County of Sac, 94 U. S. 531.

Nesbitt vs. Independent District, 144 U. S. 610.

Stockton vs. Ford, 59 U. S. 418.

In Davis vs. Brown, 94 U. S. 428, Mr. Justice Field, in support of a prior judgment, said:

“The judgment is not only conclusive as to what was actually determined, respecting such

demand, but as to every matter which might have been brought forward and determined respecting it."

In *New Orleans vs. Citizens' Bank*, 167 U. S., at page 396, Mr. Justice White, speaker for the court, said:

"The estoppel resulting from the thing adjudged does not depend upon whether it is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

*So. Pac. R. R. Co. vs. U. S.*, 168 U. S. 1.

*U. S. vs. California and Oregon Land Co.*, 192 U. S. 355.

"A cause of action is said to be the same as that of a former suit where the same evidence will support both actions; and a judgment in such former action will be a bar if the evidence necessary to sustain a judgment for the plaintiff in the second would have authorized a judgment for plaintiff in the former one."

*Taylor vs. Castle*, 42 Cal. 367, 368.

*Gayer vs. Parker*, 24 Neb. 643.

In conclusion, we call attention to the fact that after the defendant in error had submitted evidence and rested, the plaintiff in error offered the evidence hereinbefore mentioned in support of his pleas in bar

and offered no further evidence, but relied upon said special pleas (Trans., p. 54).

We believe the plaintiff in error was fully justified in such a course. We confidently expected the Trial Court to sustain said pleas, and felt that there was no occasion to gather a number of witnesses to submit testimony upon the general issue of fraud. When this case was tried on the 16th day of March, 1914, more than eight (8) years had elapsed since the issue of patent. Time had naturally rendered the collection of witnesses and the gathering of testimony difficult. Why should the plaintiff in error go to all this trouble, when he felt confident that, as a matter of law, no cause of action was stated against him and that his special pleas in bar were conclusive of the matters involved. He did rely upon the law of the case and failed to offer proof. He would have offered proof had not he felt confident of his position in the matters of law.

For these reasons, and for the reason that the questions presented are of great importance to the general public in public land matters, we earnestly urge the matters here presented, still confident that the plaintiff in error is entitled to the protection of the law, which he has invoked, and that the Trial Court committed the errors herein specified.

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United States Circuit Court  
of Appeals  
FOR THE NINTH CIRCUIT

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J. B. BISTLINE, PLAINTIFF IN ERROR

VS.

UNITED STATES OF AMERICA, DEFENDANT IN  
ERROR.

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**Brief for Defendant in Error**

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and

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STATEMENT OF THE CASE.

Since the statement of the case set forth in the brief of plaintiff in error appears to us to be sufficient for the purposes of this appeal, we make no additional statement at this time.

We except from what we have just said concerning the statement of the case by plaintiff in error the third and fourth paragraphs appearing upon page 2 of his brief. Referring to the third paragraph upon that page, we state the facts to be that in the former suit in equity in which it was sought to establish title to the lands in question in the United States as against the claims of title theretofore made by plaintiff in error, *no* issue of title was joined for the reason that by his answer in that suit plaintiff in error specifically disclaimed title or interest in said lands. We further state that the "decree" in said

paragraph referred to as a decree absolute, unconditional and without reservation, was in fact nothing more or less than an order of dismissal based upon the voluntary motion of the United States, and not pursuant to any hearing of that suit upon its merits, and not intended as a final adjudication of the cause in any sense of the term.

Referring to the said fourth paragraph, we deny that the case at bar is based upon the identical state of facts alleged in the former suit in equity. We state the fact to be that the present case is based upon the same facts alleged in the former suit in equity and in addition thereto the further facts of sale and conveyance of the lands involved by plaintiff in error to third parties, purchasers for value without notice, said sale and conveyance having been made prior to the time of commencing the former suit in equity, and said former suit having been commenced by the agents of the United States in ignorance of the said facts of sale and conveyance of said lands to innocent third parties.

Other than the exceptions just set forth, we accept the statement of the case made by plaintiff in error, and proceed to the argument without further comment.

### ARGUMENT.

Plaintiff in error has subdivided his argument under three general headings, and we feel that we can do no better than to follow the same arrangement. Accordingly, our argument is here presented in three divisions, to-wit: (I.) Sufficiency of Complaint, (II.) Election of Remedies, and (III.) Res adjudicata.

## I.

*The limitation set forth in Section 8 of 26 Stat. 1093 does not apply to an action for money damages based upon fraud perpetrated by an entryman in the securing of his patent, nor should such limitation be invoked by analogy or parallel reasoning.*

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In the absence of an Act of Congress to the contrary, it is incontestably the rule that no limitation as to the time for commencing any action is imposed upon the sovereign power. Congressional intent to the contrary must be *clearly* manifested.

United States vs. Railroad Company, 118 U. S. 120, 126.

United States vs. Insley, 130 U. S. 266.

United States vs. Jones, 218 Fed. 973.

While plaintiff in error, at page 11 of his brief, disavows any intent to rely directly or specifically upon a statute of limitation in this matter, yet it is manifest upon reading his brief upon the first branch of his argument, that he nevertheless would have this Court say that Section 8, 26 Stat. 1093, should be held to operate as a bar to this action. That section refers specifically and unequivocally to "suits to vacate and annul patents." No other style or variety of suit or action is mentioned or referred to. There is nothing in the language of the statute to indicate that Congress intended anything more than merely to set a time after which title to real estate originating in a patent from the United States should become permanently vested. Most assuredly Congress has not, in this statute, manifested "clearly" an intent that the phrase "suits

to vacate and annul patents" should be by the courts construed to include also actions at law to recover money damages for fraud, merely. In this connection, it will be observed that throughout the procedure of Federal Courts there is maintained the traditional distinction between a "suit" in equity and an "action" at law, which distinction has in the main been observed by Congress in the drafting of statutes.

On this phase of the argument, plaintiff in error relies principally upon *United States vs. Winona R. R. Co.*, 165 U. S. 463. While the statute here in question was not passed until after the commencement of the last mentioned case, the Supreme Court refers in its opinion to the statute for the purpose of arriving at the general governmental policy touching questions involving the validity of title to land. The whole reasoning of the Court is premised upon equitable considerations arising out of the lapse of time since the granting of the titles involved in the case, and also arising out of the *absence* of fraud on the part of the railroad company, grantee. Not only does the fact that the case at bar is for money damages only, and wholly founded upon fraud, distinguish it from *United States vs. Winona R. R. Co.*, but also a reading of the opinion in that case will disclose that the Court intended merely to comment upon the propriety of that action in view of the great lapse of time and the *absence* of any fraud on the part of the government's grantee. Preliminary to the controlling portion of its opinion, the court, on page 475 of the reported case, says:

"Many years have passed since the certification, and since the company, in reliance upon the title it believed it had acquired, has disposed of the lands and other parties have become interested in and have dealt with the lands



as private property. Contracts have been entered into, suits maintained—carried even to this Court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely, after such a lapse of time and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the Courts.”

Following immediately after the quotation just given, the court in speaking of the question of limitation as applied to the action, says :

“The lapse of time would be no bar, for statutes of limitation cannot be invoked against the government.”

It plainly appears, therefore, that the Court was not construing or applying any statute of limitation, but was, as we have just stated, commenting upon the propriety of the action as viewed from the standpoint of equity.

Plaintiff in error, on page 15 of his brief, has quoted at length from the authority under discussion. He has not, however, repeated enough of the text of the opinion to show the true purport and meaning of the portion set out in his brief. We will, therefore, add the concluding words of that portion of the opinion, which should be read together with the quotation on page 15 of plaintiff's brief, in order to get the true meaning thereof :

“The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress *to uphold titles* arising under certification or

patent by providing that after a certain time the government, the grantor therein, should not be heard to question them."

When, therefore, the whole of what the Court has to say in this matter is referred to, it appears very plainly that the Court was speaking of nothing else than the desirability of disturbing titles which had in good faith vested many years previous.

The plaintiff in error also relies upon *United States vs. Chandler-Dunbar Co.*, 209 U. S. 447. Upon a casual reading of that case it is true that certain language used by the Court might seem to have some application to the case at bar. But we submit that upon more mature consideration it will be discovered that the language there used was not intended to have any such force or effect as contended for by plaintiff in error. It will be observed that while the statute (Section 8, 26 Stat. 1093) in terms refers only to "suits to vacate and annul patents," the suit in *United States vs. Chandler-Dunbar Co.* was in form a suit brought to quiet title. There is, in equity, a considerable distinction ordinarily to be observed between a suit to cancel an instrument affecting title to land, and a suit to quiet title to land. This distinction exists as to the allegations required to be made in the bill, as to the proof to be adduced in support of such allegations, and as to the form and effect of a decree in conformity to such allegations and proof. A decree of cancellation would ordinarily result only in the annulling of a given written instrument, the cancellation of which might, or might not, affect title to land. A decree in a suit to quiet title would always specifically declare and establish in some claimant a vested title to land. In the authority under discussion the government evidently sought to avoid the bar of the statute affecting suits to vacate and annul pat-

ents, by bringing an action in the form of an action to quiet title merely. That is, the government evidently made the contention that the statute affected only the particular *remedy* specified, namely, a suit to cancel patent and when the Court says, on page 450 of the reported case,

“in form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place,”

it is intended merely to state that after the expiration of six years the government is barred from asserting title to patented lands, whether its title is asserted in a suit for cancellation, in a suit to quiet title, or in any other suit brought upon a claim of *title*. The Court does not say, nor should its opinion be construed to mean, that not only are all claims of *title* in the government barred, but also, that the statute bars an action at law for damages, based, not upon a claim of *title*; but upon the grantees *fraud* in the acquisition of *his* title. The case at bar is the antithesis of a suit founded on a claim of title. It *affirms* the *defendant's* title.

Accordingly, the opinion just discussed has been construed, in the case of *United States vs. Pitau* not to bar an action for damages for fraud in the acquisition of title brought more than six years after the issuance of patent.

United States vs. Pitau, 224 Fed. 604.

(See Fed. Reporter Advance Sheets for Sept. 16, 1915.)

The case just cited is a case identical with the case at bar, in

which are discussed the leading authorities on this question of limitation as cited both in our brief and in the brief of plaintiff in error. We respectfully refer this Court to the opinion of that case as setting forth the true doctrine to be observed in deciding this appeal.

Plaintiff in error insists that in recovering money damages for fraud on the part of an entryman, the government recovers that which is equivalent to the land itself, and concludes therefrom that to allow the judgment in the case at bar to stand would be to allow the government to accomplish indirectly that which it cannot do directly. We submit, without citation of authorities, that at no time in the history of English law has the money value of land been considered the equivalent of the land itself. The jurisdiction of courts of equity has always been based very largely upon the undisputed proposition that money damages representing the value of land are *not* the equivalent of the land itself, and that since *at law* only money damages for the loss of land could be obtained, the Courts of law furnished no adequate remedy for such loss. Hence, in matters pertaining to the performance of contracts conveying, or to convey, land, in matters requiring injunctive relief for the protection of land, and other equally familiar forms of procedure, the courts of equity have had jurisdiction to give specific relief by compelling the performance, or the cancellation, of such contracts, and by preventing injury threatened to be done to land. Under the facts of the case at bar, the lands in question having passed to innocent purchasers for value, the government could not obtain this equitable relief by cancelling patent and thus obtaining a return *in specie* of the land conveyed. It was compelled, therefore, to resort to



the inadequate substitute of an action at law for money damages measured by the value of the land. We submit that this is by no means the equivalent of the land itself.

We further submit without citation of authority, which citation we deem to be in this Court unnecessary, that it is a rule very generally followed in framing of statutes of limitation, that in actions based upon fraud the period of limitation does not start to run until the discovery of the fraud. It is not only reasonable to assume, but it is almost the inevitable assumption, that fraud committed by an entryman in his final proof, as in this case, would not be discovered for some little time, and possibly for a long time, after the patent had issued. The vast extent of public lands open to entry in the United States, their distance from the centers of population and the usual modes of travel, and the tremendous amount of clerical work and of field inspection to be done in connection with the entries upon the public domain and in pursuit of an inquiry calculated to disclose the facts tending to prove the truth or falsity of the final proof in the case of such entries, all plainly distinguish the situation from that of a private owner whose lands would probably be separated by a few miles at most. In view of this condition, it is reasonable to assume, that, had Congress intended the statute under discussion to impose a limitation upon actions brought for fraud, it would at least have made the usual provision that such limitation should not commence to run until the discovery of fraud.

We respectfully submit that plaintiff's objections to the sufficiency of the complaint in this case are not well founded.

## II.

*There can be no election of remedies in such a sense that the commencement of one action, which is subsequently dismissed upon plaintiff's own motion, constitutes a bar to a second action founded upon a more complete knowledge of the facts involved, unless AT THE TIME OF COMMENCING THE FORMER ACTION there existed a state of facts upon which either form of action would have been properly founded.*

\* \* \* \* \*

Plaintiff in error contends that by commencing the former suit in equity for the purpose of establishing title in the United States as against plaintiff in error, the United States exercised its option to choose between two existing remedies appropriate to the same state of facts, and was, therefore, estopped by the order of dismissal in the former suit to prosecute an action at law for damages based upon fraud in obtaining patent to the lands in question.

There is no question that his general proposition is legally correct. A litigant having open to him two forms of action, inconsistent with each other, each based upon and involving the same facts, is bound to choose the one and abandon the other. But it is also true that, to state the converse of the rule of election, where a *choice* of remedies does not exist, there can be no election. That is merely to say that where the facts of a given situation will support only one form of action, there is afforded no opportunity to resort to the rule of election of remedies for the very sufficient reason that no *choice*, that is, no election, is possible. The very term itself presupposes the existence of two or more things or objects, out of which to select one. The inquiry, therefore, in the case at bar relates to

the number of remedies or forms of action which, under the *then* existing facts, were open to defendant in error.

The bill in the former suit was filed April 10, 1911. (Trans., p. 35). The answer of plaintiff in error to that bill in paragraph 8 thereof, discloses that in September and November previous to the filing of the bill the land in question, which was exclusively the subject of the litigation, had been transferred to third persons who were not parties to that suit. (Trans., p. 49). The fact of this conveyance to third persons some months prior to the filing of the government's bill is alleged in the present action (Trans., p. 10), and is further proven by the record in the case at bar, wherein the deeds consummating such conveyance were introduced in evidence (Trans., p. 34). Therefore, at the time the former suit was commenced, there was not *in fact* any remedy open to the United States by way of divesting plaintiff in error of his title. No matter how fraudulent his final proof had been, he held a good and valid *legal* title until such time as he was divested of the same by the decree of a Court of competent jurisdiction. Prior to the commencement of an action for the purpose of obtaining such a decree, he had conveyed that title to third persons, who were presumptively innocent of any fraud or knowledge of fraud which would invalidate the original patent. Therefore, the *one and only* form of action and remedy open to the United States was a simple action at law for money damages, based upon fraud in obtaining patent to said lands.

Under such a state of facts, it is futile to talk of an election of remedies. There was no *choice* to be made. It was said of the English navy of a former time that through every rope and cable upon its vessels ran a single strand of red. So through-

out all of the law announcing the doctrine of election of remedies we find, in each instance where the rule has been applied, the element of *choice*; two or more forms of action open to the plaintiff. Thus, in the authorities contained in the brief of plaintiff in error we find the following:

"The doctrine of election means that where two inconsistent remedies are presented to the choice of a party," etc.

Peters vs. Bain, 133 U. S. 670.

"An election once made, with knowledge of the facts, between *co-existing* remedial rights," etc.

"In re Garver, 68 N. E. Rep. 667.

"A party may not take contradictory positions; and when he has a right to *choose* one of *two* modes of redress," etc.

and

"His deliberate and settled choice of *one*, with knowledge or means of knowledge of such facts as would authorize a resort to *each*," etc.

Robb vs. Vox, 155 U. S. 13.

And as in the foregoing quotations, so in all of the authorities cited by plaintiff in error, it will be observed that each presupposes the existence, *at the time of commencement of the first action*, of two or more forms of action, each equally supported by the *then* existing facts.

In this connection, we call the Court's attention to *Brown vs. Fletcher*, 182 Fed. 936, decided by the Circuit Court of Appeals of the Sixth Circuit, which is decisive of the case at bar in holding, as we have just submitted, that no election can be said to be made unless at the time of filing of the first action,



two or more forms of action are equally open to plaintiff. The opinion in this authority cites case after case from the various Federal Courts, as well as from the highest Courts of many states, all to the same effect. We respectfully request a careful reading of this authority by this Court, inasmuch as it states the law pertinent to the question here involved fully and in much better form than any of which we feel capable.

What has been already said in this, the second branch of the argument, we submit should be decisive on the question raised for the reason that the facts of this case show that no election was open to the United States, and that the former suit in equity was filed in ignorance of the conveyance of the lands in question to innocent purchasers for value. However, plaintiff in error contends and argues at length that the trial court erred in refusing to instruct the jury that in making an election of remedies, the means of knowledge would be the equivalent of actual knowledge. In support of this contention, plaintiff in error insists that the United States was bound by constructive notice given by the recording of the deeds conveying the lands to third parties and by the possession of such lands by such parties pursuant to such deeds.

In answer to this contention, we submit that the trial Court's error, if any was committed, was not in the instructions given the jury, but was committed in ever submitting the plea of election of remedies to the jury at all. Without repeating what we have said above concerning the matter, we reiterate that the undisputed facts show that when the former suit in equity was commenced, the title to the lands had passed to innocent third parties and that the United States had not, as a matter of fact, any cause of action to be brought against plaintiff in error for

the purpose of divesting him of title. The reason being, that at that time he had in fact no title, and the only remedy open to the government was an action at law to recover damages for his fraud. And since, in the case at bar, defendant's own exhibit B, (Trans., p. 43) and the three deeds to the third parties in question offered by the government (Trans., p. 34) showed those facts conclusively, the Court should have ruled that, as a matter of law, the United States did not, at the time of filing the former equity suit, have any election of remedies open to it, and should, therefore, have refused to submit the question to the jury. There was no dispute about these facts, and, therefore, there was no issue of fact to be passed on by the jury. The trial courts error, therefore, did not prejudice plaintiff in error, but, on the contrary, operated to his benefit. It left open to him an issue from which under the undisputed facts of the case he should have been foreclosed.

Assuming, however, for the sake of argument, that there was an issue of fact on the question of election of remedies, the trial Court's instruction on that subject, (Trans., p. 55), was ample. It placed before the jury for their consideration everything which, as a matter of law, should have been considered in arriving at their verdict. The only matters of which plaintiff in error contends he lost the benefit, are the two rules of law which impute constructive notice from recording of deeds and from the possession of the lands in question by the purchasers, respectively.

So far as constructive notice is concerned, it will be borne in mind that it is strictly a creature of the recording acts. No person is bound by constructive notice except those named in such acts. The act governing the recording of these deeds is to be found in the *Idaho Revised Codes*, Section 3159.

“Every conveyance of real property, acknowledged or approved, and certified, and recorded as prescribed by law, from the time it is filed with the Recorder for record, is constructive notice of the contents thereof to *subsequent purchasers and mortgagees*.”

The United States was neither a subsequent purchaser nor a mortgagee. Its rights were not only antecedent to the deeds given the purchasers of the lands in question, but were antecedent to those of plaintiff in error. The lands had been owned by the United States from the date of their acquisition as a part of the public domain. And, assuming that the sovereign is ever subject to the constructive notice provided for in the recording acts of a State, it would not, as a holder of antecedent rights, be in any way bound to take notice of the deeds in question.

“It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records in order to protect their own interests. It is equally well settled that such record is not notice to the holders of antecedent rights—that is, to those who have acquired their rights before the time when the record is made—and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of prior record. In other words, the registration of an instrument does not act as a *notice backwards* in time.”

Pomeroy Eq. Jur., Sec. 656 *and* 657.

Record notice arises only pursuant to wording of recording acts. When only *subsequent* parties are named in the act, there is no constructive notice to those whose rights antedate the recording.

Stuyvesant vs. Hone, 1 Sand. Ch. 419.

The same is true as to notice constructively given by the possession of a purchaser of land. Such notice runs only to those claiming subsequently acquired rights. For the reasons given above, the United States was not obliged to take notice of the possession of the purchasers of these lands, inasmuch as its rights were antecedent to theirs.

Further, it has been held in a case directly in point that the United States is not bound in the matter of the disposal of the public domain to make the same investigation and inspection of the lands in question that a private person might be required to do. In *United States vs. Minor*, 114 U. S., 233, on page 239 *et seq.* the Supreme Court says:

“Is there any reason to be found in the relation of the government to such a case as this which will deprive it of the same right to relief as an individual would have? On the contrary, there are some reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The government owns millions and millions of acres of land, which are by law open to homestead, pre-emption, public and private sale. The right and title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sales of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title called a patent, there is established in each land district an office in which there are two officers, and no more, called register and receiver. These districts often include twenty thousand square miles or more, in all parts of which the lands of the government subject to sale, pre-emption and homestead are found. These officers do not, they cannot visit these lands. They have maps showing the location of the government lands, and their sub-division into townships, sections and parts of sections, and when a person desires to initiate a claim to



any of them, he goes before them and makes the necessary statement, affidavits and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

"For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce.

"In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government except in a few rare instances, to know anything of the truth or falsehood of their statements. In the cases where there is no contesting claimant there is no adversary proceedings whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and it makes no issue on the statement of the claimant.

"When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all of the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

So that, again assuming, for the sake of the argument, that the question of election or remedies was properly a matter to be passed on by the jury, it fully appears that the instruction in question placed before jury all the pertinent facts.

In view of the fact that the suit in equity was voluntarily

dismissed upon the filing of an answer setting up the conveyance to third persons and disclaiming any interest in the lands in question, and in further view of the fact that the three deeds before referred to showed conclusively the conveyance of these lands long before the equity suit was commenced, the jury very properly concluded that the United States Attorney obtained knowledge of the rights of these purchasers for the first time, when the answer to the bill in equity was filed. The jury further properly found that at the time of commencing the suit in equity there was in fact no election open to the United States, on account of the fact that the lands had already been conveyed to innocent third persons. Therefore, they could not find otherwise on the special plea of election of remedies than against plaintiff in error.

We submit that under the facts of this case the defendant in error cannot be said to have made an election of remedies by the filing of the former suit in equity.

### III.

*Before a matter becomes res adjudicata so as to constitute an estoppel or a bar to a second action, the matter must be considered upon its merits. When a suit is instituted in ignorance of material facts which are fatal to its continuance, and such suit is afterwards, upon learning such facts, dismissed to make way for a different form of action properly founded upon all of the facts involved, such dismissal does not constitute res adjudicata.*

\* \* \* \* \*

Plaintiff in error contends that the commencement in 1911 of a suit in equity brought by the United States against plaintiff in error to cancel the patent theretofore issued to him, and

the subsequent dismissal of that action upon the motion of the then United States Attorney, amounted to *res adjudicata* and should be held to bar the present action at law for damages based upon fraud committed by plaintiff in error.

The facts are that at the time of commencing the former suit in equity, the attorneys for the United States believed that upon alleging the filing by the homestead entryman, his final proofs, and the facts constituting fraud in such final proofs, they had stated *all* of the ultimate facts involved in the case (defendant's Exhibit A, Trans., p. 35). That in answer to those allegations, defendant, now plaintiff in error, after denying the allegations of fraud, alleged as a further defense the conveyance of the lands involved to third persons not parties to the suit, and that "this defendant, therefore, alleges that he disclaims any interest whatever in or to any of said lands or any part thereof." (See defendant's Exhibit B, Trans., p. 42). That upon ascertaining that the aforesaid conveyances to innocent third persons, purchasers for value, had been made, the then United States Attorney moved that the said suit be dismissed and that by reason of such motion, and for that reason alone, the court accordingly dismissed the action. (See defendant's Exhibit D, Trans., p. 53).

Plaintiff in error states, on page 19 of his brief, that in the former suit in equity "a decree upon the *merits of the issues joined* was duly made," etc. This is patently a misapprehension of the meaning and effect of the order dismissing the action, above referred to as defendant's Exhibit D. The text of this order is as follows:

"This cause came on regularly for hearing before the Honorable F. S. Dietrich, Judge of the above entitled

Court, the plaintiff appearing by C. H. Lingenfelter, United States Attorney and Solicitor for Complainant, and upon motion of the Solicitor for the Complainant, said suit is dismissed.

"Wherefore, by reason of the *premises*, it is ordered, adjudged and decreed that said suit be dismissed and that the plaintiff take nothing by said action."

The "premises" upon which the order dismissing the suit was made are set forth in the order above quoted, and are the motion of the United States Attorney. Nothing more. No mention is made of any hearing upon the merits, nor of any evidence received and taken under consideration, nor, in short, of any reason for dismissal appearing either from the facts involved or in the law pertaining thereto. It is more than apparent that the dismissal of this suit in equity was absolutely *pro forma* and merely an act incidental and preliminary to the filing of the present action at law for damages on account of the fraud of plaintiff in error. This fact was fully understood by the learned Judge before whom the present case was tried, when he refused to sustain the plea of *res adjudicata* advanced by plaintiff in error. Had he, in ordering the dismissal of the former suit in equity, intended in any way an adjudication of that case upon its merits, he would have, in the present case, sustained the plea of *res adjudicata* as a matter of course.

Plaintiff in error, on page 27 of his brief, states that "there are no reservations, conditions or limitations whatever in the decree or in the record. The decree recites that said 'cause came regularly on for trial,' and so far as the record shows the trial may have been upon evidence submitted which was found to be insufficient or unworthy (Trans., p. 53)". The decree referred to does not so recite. It recites that the cause came on for *hearing*, and that, *premised* upon the motion of the



United States Attorney, the suit was ordered dismissed. Referring to the quotation from the brief of plaintiff in error, next above, this order of dismissal contains within itself the plain reservation, condition and limitation that it was made upon the motion of plaintiff, and not otherwise. The cause must have come on for "hearing" in some form or other before that motion, or any other matter touching said cause, could be entertained. It is true that the order recites "that the plaintiff take nothing by said action." On these words plaintiff in error builds up his entire argument in support of his plea of *res adjudicata*. In view of the facts disclosed by the record of the former suit, which facts we have pointed out above, the closing words of the order of dismissal become purely formal, having neither relation to, nor effect upon, the substance of the suit. To hold that under such circumstances that order should be viewed as a final determination of all the facts involved, would be to extend the effect of an otherwise righteous rule to an unreasonable limit, and to exchange the substance for its shadow.

A judgment of dismissal based upon the voluntary action of a party is not *res adjudicata*."

23 Cyc. 1230.

A judgment or final order in a cause is not a bar to another action unless it is made or rendered on the merits of the cause.

14 Cyc. 452.

A dismissal which is not on the merits is usually treated as being without prejudice, although not so stated in the order.

14 Cyc. 454.

"It must appear that a trial was had involving or at least giving full opportunity for a consideration of the case on its merits, and settling the issues alleged to be concluded by it and by the judicial decision, entered either on the findings of the Court, the verdict of the jury, or *non obstante verdicto*."

23 Cyc. 1226.

In view of the authority last quoted, it will be noted that in the former suit in equity there were neither findings, a verdict, or a judgment notwithstanding the verdict.

It may well be urged that the exact question presented by plaintiff in error has been heretofore decided by this Court adversely to his contention. In *Southern Pacific Ry. Co. vs. United States*, 186 Fed. 737, it was held that a decree in a suit by the United States against a railroad company to determine its right to certain lands, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought to recover from the company the price of the same lands on an allegation that they had been sold by the company to bona fide purchasers whose title had already been confirmed. It will be noted that in the authority just cited not only was a suit in equity *commenced*, as in the case at bar, to annul patents already issued to the government's grantee, but also that the suit was prosecuted to a *final decree* under which it was determined that the railroad company's title was inferior to that of the United States. Subsequent to that decree a second suit was commenced to recover from the railroad company the value of the same lands on the ground that said lands had been conveyed to innocent third parties by the railroad company. The difference between the authority under dis-

cussion and the case at bar is, that in the case at bar, as soon as it was discovered that the rights of bona fide purchasers had intervened, the equity suit was dismissed and an action instituted to recover the value of the lands conveyed to such purchasers. We therefore submit that this Court has already decided the exact question involved in this appeal adversely to plaintiff in error.

We have no quarrel with the authority of the various opinions of the United States Supreme Court cited by plaintiff in error but in each and every one of such cases, as well as in all other authorities cited by plaintiff in error in support of his contention of *res adjudicata*, a reading of the same will disclose that there was a *real* joinder of the issues and a judgment rendered upon such issues joined, upon the merits of the cause. In the present case, the United States in the former suit in equity filed its bill calculated to establish title in itself and to divest plaintiff in error of any title, right or interest in the land involved (Trans., p. 35). That bill prayed that plaintiff in error be required to appear and answer the allegations of the bill (Trans., p. 42). In his answer (Trans., p. 51) plaintiff in error disclaimed any and all interest in said lands. The very gist of that suit was conflicting claims of title existing between plaintiff in error and the United States. By his disclaimer plaintiff in error neither joined nor tendered any issue. The effect of such disclaimer was exactly the opposite. It rendered impossible any issue of title between himself and the United States. Under these circumstances, the inquiry naturally arises, what matters at issue were, as plaintiff in error contends, conclusively determined by the motion of the United States Attorney and the dismissal which was ordered pursuant

to such motion? We think the question must be answered, that there were no matters so determined by that order.

Freeman on Judgments, 4th Ed. at Sec. 260, says :

“No judgment can be available as an estoppel, unless it is a judgment on the merits.”

The very best construction that could be given the order dismissing the suit in equity, would be that it was a judgment given because of a non-joinder of parties defendant, the missing parties being the purchasers from plaintiff in error as shown by his answer in the former suit (Trans., p. 49).

Freeman on Judgments, at Sec. 266, says :

“A judgment given because of a misjoinder or non-joinder of parties plaintiff or defendant \* \* \* \* cannot defeat a subsequent suit in which the vice causing the former judgment does not exist.”

Therefore, if the order relied on by plaintiff in error be given the most favorable construction, it cannot avail him, because in the second action there could be no objection of non-joinder of his purchasers. They would have been, in this action, neither necessary nor proper parties.

The same authority at Section 270 A, speaking of suits in equity says :

“A bill may be dismissed before the hearing, on the motion of the plaintiff, upon payment of costs. Such a dismissal has no higher effect as *res adjudicata* than the voluntary dismissal of an action at law.”

Again, at Section 261, he states the following rule :

Judgments of non-suit, of *non prosecutur*, of *nolle prosequi*, of dismissal, and of discontinuance, are not *res adjudicata*.



Finally at Section 261, page 476, he discusses the exact question here involved, citing full authorities for his statements, in a manner conclusively contrary to the contentions of plaintiff in error :

“At common law there is no form of an entry in the books of a judgment dismissing the action. Every judgment against a plaintiff is either upon a *retraxit*, *non prosequitur*, nonsuit, *nolle prosequi*, discontinuance, or a judgment on an issue found by a jury in favor of defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same ; it is as follows : ‘Therefore, it is considered by the Court that plaintiff take nothing by his writ, and that the defendant go without day, and recover of plaintiff his costs.’ Of these several judgments, none but a *retraxit* or one on the merits will bar subsequent actions.”

The proceedings of Federal Courts in equity suits are in general those, or the equivalent of those, at common law. Therefore, in view of the authority just cited, the order of dismissal relied upon by plaintiff in error cannot be construed as a final judgment so as to constitute *res adjudicata*. It shows upon its face that it is not a judgment founded either upon the verdict of a jury, the findings of a Court, or upon demurrer. and most assuredly it contains none of the elements of a *retraxit*. It must be held either a *non prosequitur* or a discontinuance. In form it is most similar to the former. As either, it does not bar a subsequent action. It contains the words, “that plaintiff take nothing,” just as did the traditional form of a judgment of *non prosequitur* or of discontinuance, as shown by the last quoted authority. In spite of that fact, neither of those judgments were held to bar another action. For the same reasons, the order dismissing the former suit in equity should not be held to bar the present action at law.

In view of the facts disclosed by the record of the former suit in equity and by the record of the case at bar, it plainly appears that the former suit was instituted under a misapprehension of the facts and in ignorance of the rights of third parties who had purchased from plaintiff in error. It further plainly appears that any irregularity in the text of the order dismissing that suit was an inadvertance on the part of the United States Attorney. It is patent that the attorney preparing that order never intended thereby to retract the plaintiff's claims of fraud on the part of the entryman, nor to confess a final judgment in his favor. On the question of actions brought under a misapprehension of plaintiff's rights, Black on Judgments, at Section 733, states the true rule as follows:

"As we have already intimated, cases not infrequently arise in which a party acting upon a certain theory as to his legal rights, or as to the legal effects of a given state of facts or transaction, bring his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case the former judgment is no bar to the second action. It is true the subject matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts." (and illustrations there given.)

In *Haldeman et al. vs. United States*, 91 U. S. 584, it is held that in order that a judgment may constitute *res adjudicata*, (1) There must have been a right adjudicated or released in the first suit, and that *this fact must appear affirmatively*; (2) There must have been more than a judgment of dismissal for want of prosecution.

In *Hopkins vs. Lcc*, 6 Wheat. 109, it is held that the rule of estoppel by judgment does not apply to matters which can only be argumentatively inferred from the decree.

We submit that a dismissal upon motion of plaintiff is no more an adjudication on the merits than a dismissal for want of prosecution, and we further submit that the contention of plaintiff in error to the effect that the order of dismissal upon which he relies was an adjudication upon the merits, is, as shown by his brief, inferred from such order in a purely argumentative manner.

In *Hughes vs. United States*, 71 U. S. 232, the true rule of estoppel by judgment is stated as follows :

“In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a *misconception of the form of proceedings*, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.”

In *Lyon vs. Perin*, 125 U. S. 698, cited by plaintiff in error in support of his contention, the decree which was there held to be *res adjudicata* of the case under consideration, recited a submission of the pleadings to the Court for their consideration, and that *the equities were founded to be with the defendant*. The opinion further recites that a judgment of dismissal of a former bill is conclusive *only* when such judgment was rendered upon a hearing of the case. It will be perceived, therefore, that the last cited authority is not at all in point on plaintiff in error's proposition, while the other foregoing au-

thorities from the Supreme Court are directly in point to the contrary.

Finally, on this phase of the argument, we wish to make it very plain that we do not at all object to the rule which requires that a matter shall be finally adjudicated only once. But we do most pointedly object to the artificial construction of the order of dismissal involved in this appeal, which plaintiff in error asks this Court to adopt. That construction would change a simple, voluntary dismissal into a judgment rendered upon the merits after full hearing and consideration, would deny the defendant in error its day in Court, and would enable plaintiff in error to evade the verdict of a jury of his peers rendered after a full presentation of the facts involved in this case.

We submit that the learned trial Judge committed no error in overruling the special plea of *res adjudicata*.

### CONCLUSION.

Before finally submitting this matter, we wish in conclusion to dwell briefly upon the propriety of this action. Plaintiff in error inveighs rather violently against the course taken by the United States and its officers, and refers to this action as having the appearance of a subterfuge or a trick calculated to reach an end regardless of the means employed. We feel that we should not allow such imputations to pass unchallenged.

It will be noted that this action is premised upon the charge that plaintiff in error and his witnesses defrauded the United States by falsifying their testimony offered in final proof under his homestead entry upon the public domain. The government and its officers undertook the burden of proving these charges



not only by a preponderance of the evidence, but by evidence which should be clear and convincing almost to the degree required in a criminal prosecution. Such is the rule in the proof of fraud. These charges and the evidence offered in support thereof have been submitted to a jury, in the selection of which plaintiff in error participated. That jury found that he was guilty of the fraud with which he was charged. He has had his day in Court and has enjoyed all of the benefits accruing to him by reason of the fact that he appeared as a defendant and by reason of the rule of law requiring strict and complete proof of the charge of fraud laid against him. It seems to us, therefore, that it does not lie in his mouth to accuse the government's agents of unfairness and lack of scruple in this matter.

Quoting from *Fenmore vs. United States*, 3 Dallas 233,

“surely it ought never to have been a subject of argument in a court of justice, whether, on stating a manifest fraud practiced upon the public credit and treasury, the United States is entitled to recover an equivalent for the pecuniary injury, from the avowed delinquent.”

And quoting again from *United States vs. Trinidad Coal & Coke Co.*, 137 U. S., 160,

“in the matter of disposing of the vacant coal lands of the United States the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre, which is required from those desiring to obtain a title to such land, had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for the disposal of them Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the

whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. \* \* \* \* The defendant is a wrong-doer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands."

Plaintiff in error should avoid the too common mistake of thinking of the government as something separate and independent from himself and his fellow citizens. Such is not the case. The officers of the government are as much the agents and servants of plaintiff in error as of any or all of his fellow citizens. In matters touching the disposal of public lands, those officers act in response to a correct and far sighted economic policy which has dictated that the public domain shall not fall into the hands of the few, there to be exploited under a system of private landlordism, but shall be held and disposed of for the benefit of the many, for all alike. The public domain is a vast trust fund, the protection of which is as much the duty of plaintiff in error as of any other citizen. A jury of his peers has found that plaintiff in error obtained a portion of that trust fund through fraud. Such being the fact, the rudiments of common justice demand that he should make adequate reparation as far as possible. He has, therefore, no valid reason to complain of the government's course in this matter.

Respectfully submitted,

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*Attorneys for Defendant in Error.*

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,  
Appellant,  
vs.

BRITISH COLUMBIA MARINE RAILWAY  
COMPANY, LIMITED, a Corporation,  
Claimant of the Steamship "ALASKAN,"  
Her Boilers, Engines, Machinery, Boats, Ap-  
parel and Furniture.  
Appellee.

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Apostles.

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Upon Appeal from the United States District Court for  
the Western District of Washington, Northern Division.

Filed

JUL 2 - 1913

F. D. MONTGOMERY





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COMPANY, LIMITED, a Corporation,  
Claimant of the Steamship "ALASKAN,"  
Her Boilers, Engines, Machinery, Boats, Ap-  
parel and Furniture.

Appellee.

---

Apostles.

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Upon Appeal from the United States District Court for  
the Western District of Washington, Northern Division.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,

Intervening Claimant.

**Names and Addresses of Counsel.**

H. A. MARTIN, Esq., Proctor for Libelant and Ap-  
pellant,

204-207 Collins Building, Seattle, Wash-  
ington.

IRA BRONSON, Esq., Proctor for Respondent and  
Claimant,

614 Colman Building, Seattle, Washington.

J. S. ROBINSON, Esq., Proctor for Respondent  
and Claimant,

614 Colman Building, Seattle, Washington.

RICHARD SAXE JONES, Esq., Proctor for Re-  
spondent and Claimant,

627 Colman Building, Seattle, Washington.

[1\*]

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\*Page-number appearing at foot of page of certified Transcript of  
Record.

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Tackle, Ap-  
parel and Furniture,

Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Statement.**

TIME OF COMMENCEMENT OF SUIT.

July 30, 1912.

NAMES OF PARTIES.

Arthur F. Hutton, doing business as Hutton Ma-  
chine Works, Libelant.

Steamship "Alaskan," her boilers, engines, ma-  
chinery, boats, tackle, apparel and furniture, Re-  
spondent.

DATES WHEN PLEADINGS WERE FILED.

Libel—July 30, 1912.

Answer to Libel—September 11, 1912.

Amended Libel—June 29, 1914.

ISSUANCE OF PROCESS AND SERVICE  
THEREON.

On July 30, 1912, issued Monition and Attachment

against Steamship "Alaskan," etc., and delivered the same to Marshal for service. On the 2d day of August, 1912, Marshal returned the same into the clerk's office with return indorsed thereon showing seizure of the steamship "Alaskan," etc., and of the release thereof pursuant to Section 941, R. S. U. S. [2]

#### REFERENCE TO COMMISSIONER.

Cause was referred to Commissioner William D. Totten to take and report the testimony, and on July 3, 1914, said Commissioner duly returned into the clerk's office his transcript of the testimony so taken, together with the exhibits offered in evidence before said Commissioner.

#### TIME OF TRIAL.

This cause was submitted to the Honorable Jeremiah Neterer, Judge of the District Court, on briefs and testimony taken before a Commissioner and was by him taken under advisement and a Memorandum Decision was handed down and filed September 8, 1914. Motion for rehearing was submitted on briefs and taken under advisement by the Court and Memorandum Decision on Reconsideration of Decision on Merits was filed October 15, 1914.

#### DATE OF ENTRY OF DECREE.

Decree of Dismissal was made and entered and filed in said District Court December 2, 1914, and Notice of Appeal was served and filed May 4, 1915.

H. A. MARTIN,

Proctor for Libelant and Appellant. [3]

**[Libel and Complaint.]**

*In the District Court of the United States for the  
Western District of Washington.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant.

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, Boats, Tackle, Apparel and Fur-  
niture,

Respondent.

The libel and complaint of Arthur F. Hutton, doing business as Hutton Machine Works, against the steamship "Alaskan," whereof, ——— of late was master, her boilers, engines, machinery, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. That at all times herein mentioned the libellant, Arthur F. Hutton, doing business as Hutton Machine Works, has been and now is a resident of Seattle, King County, Washington, and that he has filed with the clerk of the Superior Court for King County, State of Washington, the certificate of firm name, as is by the statutes of the State of Washington in such cases made and provided.

Second. That the said steamship "Alaskan," now lying at Seattle, King County, Washington, in the



district aforesaid, is a vessel of about One Hundred (100) tons burden, and at the time when the said cause of action hereinafter stated and set forth arose, was enrolled and listed for the coasting trade, and employed in the business of commerce, a navigation between ports of the different states and territories of the United States.

Third. That at all times herein mentioned the libellant was [4] engaged in fitting out, furnishing and repairing boats, together with other lines of trade connected with his concern as the Hutton Machine Works, in Seattle, King County, Washington, and that between the dates of the 24th day of August, A. D. 1909, and the 29th day of September, A. D. 1909, the said libellant performed labor, rendered services and furnished materials upon the said steamship "Alaskan," at the special instance and request of the owners and operators of the said boat in said City of Seattle, King County, Washington, which labor performed, services rendered and materials furnished upon said boat was of the reasonable value of Seven Hundred and Fifty-five Dollars and Forty-eight Cents, (\$755.48), which said amount is a lien upon the said vessel.

Fourth. That the master of said steamship or vessel and her officers and owners have never paid to this libellant the said sum of money, or any part thereof except the sum of One Hundred Fifty-four Dollars, Sixty-one Cents (\$154.61); and that there is now due and owing to the said libellant the sum of Six Hundred *and* Dollars and Eighty-seven Cents (\$600.87) which the said master, officers and owners

of the said steamship "Alaskan" have wholly failed, neglected and refused to pay, and that the said sum of \$600.87 is now a lien against the said steamship "Alaskan," which is now lying at Seattle, King County, Washington, in said Western District of Washington.

Fifth. That all and singular of the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, this libellant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steamship, her boilers, engines, machinery, boats, tackle, apparel [5] and furniture, and that all persons claiming any right, title or interest in the said steamship, or vessel, may be cited to appear and answer upon oath, all and singular matters aforesaid, and that your libellant may have judgment herein in the sum of Six Hundred Dollars and Eighty-seven Cents (\$600.87), together with the costs and disbursements herein, and that the said steamship may be condemned and sold to pay the demands and claims of your libellant aforesaid, with interest and costs and that the libellant may have such other and further relief as in law and justice he may be entitled.

Doing Business as Hutton Machine Works.

H. A. MARTIN,

Proctor for Libellant.

ARTHUR F. HUTTON,

Western District  
of Washington,—ss.

Arthur F. Hutton, being first duly sworn, upon oath deposes and says: That he is the Arthur F. Hutton who is the proprietor of the Hutton Machine Works, and that he is the libellant above named who has subscribed to the foregoing libel; that he has read the said libel, knows the contents thereof and believes the same to be true.

ARTHUR F. HUTTON.

Subscribed and sworn to before me this 30th day of July, A. D. 1912.

[Seal of Notary]                      LE ROY L. TODD,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Indorsed]: Libel. Filed in the U. S. District Court, Western Dist. of Washington, July 30, 1912. A. W. Engle, Clerk. By S., Deputy. [6]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant.

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,  
Intervening Claimant.

**Answer.**

Comes now the claimant herein and answering the libel and complaint of the libelant, denies and alleges as follows:

I.

Answering paragraph FIRST of said libel, this claimant has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained and therefore denies the same.

II.

Answering paragraph THIRD of said libel, this claimant specifically denies that labor services or materials were furnished to the steamship "Alaskan" at the special instance and request of the owners and operators, and that the sum therein alleged or any other sum is a lien upon the said vessel, and as to the other allegations therein contained this claimant has no knowledge or information sufficient to form a belief, and therefore denies the same.

III.

Answering paragraph FOURTH this claimant denies that the said sum of \$600.87, or any sum, is a lien against the said vessel, and as to the other allegations therein contained this claimant has no knowledge or information sufficient to form a belief, and therefore denies the same. [7]

WHEREFORE, the claimant prays that the prayer of the libelant be not allowed and that the



claimant be decreed possession of the said vessel, free from libellant's alleged lien, and that claimant may have judgment for its costs and disbursements and such other relief as to Court may seem meet.

RICHARD SAXE JONES,  
IRA BRONSON,

Proctors for Claimant.

State of Washington,  
County of King,—ss.

Ira BRONSON, being duly sworn, deposes and says: That he is an attorney for the British Columbia Marine Railways Company, Ltd., claimant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and that the same are true; that he makes this affidavit for the reason that none of claimant's officers are at present within the jurisdiction.

IRA BRONSON,

Subscribed and sworn to before me this 9th day of September, 1912.

[Seal]

ROBERT W. REID,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Due service of a copy hereof admitted this 11th day of Sept., 1912.

H. A. MARTIN.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 11, 1912. Frank L. Crosby, Clerk. By F. S. Simpkins, Deputy. [8]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,

Intervening Claimant.

**Stipulation [That Libel may be Amended, etc.]**

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties to the above-entitled ac-  
tion, by and through their respective attorneys, that  
the libel heretofore filed by the libelant herein, may  
be amended, by amending the fourth paragraph  
thereof to read as follows:

**FOURTH.**

That the master of said steamship or vessel and  
her officers and owners have never paid to this libel-  
ant the said sum of money or any part thereof, ex-  
cept the sum of One Hundred Fifty-four and  
61/100 (\$154.61) Dollars, and that there is now due  
and owing to said libelant the sum of Six Hundred  
and 87/100 (\$600.87) Dollars, which the said mas-

ter, officers and owners of the said steamship "Alaskan" have wholly failed, neglected and refused to pay and that the said sum of Six Hundred and 87/100 (\$600.87) Dollars is now a lien against the said steamship "Alaskan" under that certain act of the laws of the State of Washington, entitled "An act relating to liens upon steamers and boats, their tackle, apparel and furniture and amending Section 5953 of Ballinger's Annotated Codes and Statutes of the State of Washington" being Chapter 24 of the Laws of 1901, page 21 of the Session Laws of the State of Washington and being Section 1182 of Remington & Ballinger's Annotated Code of the State of Washington, and in Admiralty, and that the said steamship "Alaskan" was at the time [9] of the filing of the libel herein lying at Seattle, King County, Washington, in the Western District of Washington,

AND IT IS FURTHER STIPULATED AND AGREED that the answer heretofore filed to the libel herein, may stand as an answer to the amended libel herein.

Dated at Seattle, Washington, this 31st day of January, A. D. 1903.

H. A. MARTIN,

Proctor for Libellant.

IRA BRONSON,

J. S. ROBINSON,

Proctors for Respondent and for Intervening Claimant.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, June 29, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [10]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," her Boilers, Engines,  
Machinery, Boats, Tackle, Apparel and Fur-  
niture,

Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD., a  
Corporation,

Intervening Claimant.

**Amended Libel.**

The libel and complaint of Arthur F. Hutton, doing business as Hutton Machine Works, against the steamship "Alaskan," whereof ——— of late was master, her boilers, engines, machinery, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. That at all times herein mentioned the libelant, Arthur F. Hutton, doing business as Hutton



Machine Works, has been, and now is a resident of Seattle, King County, Washington, and that he has filed with the clerk of the Superior Court for King County, State of Washington, the certificate of firm name, as is by the statutes of the State of Washington, in such cases made and provided.

Second. That the said steamship "Alaskan," now lying at Seattle, King County, Washington, in the district aforesaid, is a vessel of about one hundred (100) tons burden, and at the time when the said cause of action hereinafter stated and set forth arose, was enrolled and listed for the coasting trade, and employed in the [11] business of commerce, a navigation between ports of the different states and territories of the United States.

Third. That at all times herein mentioned the libellant was engaged in fitting out, furnishing and repairing boats, together with other lines of trade connected with his concern as the Hutton Machine Works, in Seattle, King County, Washington, and that between the dates of the 24th day of August A. D. 1909, and the 29th day of September A. D. 1909, the said libellant performed labor, rendered services and furnished materials upon the said steamship "Alaskan," at the special instance and request of the owners and operators of the said boat in said City of Seattle, King County, Washington, which labor performed, services rendered and materials furnished upon said boat was of the reasonable value of Seven Hundred Fifty-five and 48/100 (\$755.48) Dollars, which said amount is a lien upon the said vessel.

Fourth. That the master of said steamship or vessel and her officers and owners have never paid to this libelant the said sum of money, or any part thereof, except the sum of One Hundred Fifty-four and 61/100 (\$154.61) Dollars, and that there is now due and owing to said libelant the sum of Six Hundred and 87/100 (\$600.87) Dollars, which the said master, officers and owners of the said steamship "Alaskan" have wholly failed, neglected and refused to pay and that the said sum of Six Hundred and 87/100 (\$600.87) Dollars is now a lien against the said steamship "Alaskan" under that certain act of the laws of the State of Washington, entitled "An act relating to liens upon steamers and boats, their tackle, apparel and furniture and amending Section 5953 of Ballinger's Annotated Codes and Statutes of the State of Washington" being Chapter 24 of the Laws of 1901, page 21 of the Session Laws of the State of Washington and being Section [12] 1182 of Remington & Ballinger's Annotated Code of the State of Washington, and in Admiralty, and that the said steamship "Alaskan" was, at the time of the filing of the libel herein, lying at Seattle, King County, Washington, in the Western District of Washington.

Fifth. That all and singular of the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, this libelant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime

jurisdiction may issue against the said steamship, her boilers, engines, machinery, boats, tackle, apparel and furniture, and that all persons claiming any right, title or interest in said steamship or vessel, may be cited to appear and answer upon oath, all and singular matters aforesaid, and that your libelant may have judgment herein the sum of Six Hundred and 87/100 (\$600.87) Dollars, together with the costs and disbursements herein, and that the said steamship may be condemned and sold to pay the demands and claims of your libelant aforesaid, with interest and costs and that the libelant may have such other and further relief as in law and justice he may be entitled.

A. F. HUTTON,

H. A. Martin.

Proctors for Libelant. [13]

State of Washington,  
County of King,—ss.

Arthur F. Hutton being first duly sworn upon oath deposes and says: That he is the Arthur F. Hutton who is the proprietor of the Hutton Machine Works and that he is the libelant above named who has subscribed to the foregoing libel; that he has read the said amended libel, knows the contents thereof and believes the same to be true.

ARTHUR F. HUTTON.

Subscribed and sworn to before me this 12th day of March, A. D. 1913.

[Seal]

H. A. MARTIN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Service of within amended libel and receipt of copy admitted this 4th day of June, 1913. Ira Bronson, Attorney for Claimant and Respondent.

[Indorsed]: Amended Libel. Filed in the U. S. District Court, Western Dist. of Washington, Jun. 29, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [14]

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,  
Intervening Claimant.

### **Order of Reference.**

This cause coming regularly on for hearing on the motion of the libelant for an order of reference, referring the above-entitled matter to a Commissioner for the taking of testimony herein and it appearing to the Court that the libelant has heretofore filed his libel herein against the steamship "Alaskan" and that thereafter upon the seizure of the said boat the British Columbia Marine Railways Com-



pany, Ltd., a corporation, appeared herein as intervening claimant and filed its answer herein denying the allegation of the libel, and the Court being fully advised in the premises, it is hereby ordered, adjudged and decreed that the above-entitled matter be and the same is hereby referred to William D. Totten as a Commissioner for the taking of the testimony herein with directions to take the testimony herein and return the same to this court.

Done in open court this 21st day of November,  
A. D. 1912.

CLINTON W. HOWARD,  
Judge. [15]

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD., a  
Corporation,

Intervening Claimant.

**Stipulation [That Paragraph 3 of Libel May be  
Amended.]**

It is hereby stipulated and agreed by and between  
the libelant and the intervening claimant that para-

graph three of the libel may be amended by inserting the total amount of the repairs to make it read \$755.48 instead of \$655.48.

H. A. MARTIN,

Proctors for Libelant,

J. S. ROBINSON,

Of Proctors for Intervening Claimant. [16]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

In the above-entitled cause, pursuant to the order of the Honorable Clinton W. Howard, Judge of the United States District Court for the Western District of Washington, Northern Division, In Admiralty, dated the 21st day of November, 1912, the following proceedings were had and testimony taken before me.

On the 10th day of December, 1912, at 10 o'clock in the forenoon, personally appeared before me, H. A. Martin, Esq., proctor for libelant, and Messrs.

(Testimony of John Urbanek.)

Richard Saxe Jones and Ira Bronson, proctors, and J. S. Robinson, Esq., representing the respondent and intervening claimant, and thereupon the following testimony was taken: [17]

**[Testimony of John Urbanek, for Libelant.]**

JOHN URBANEK, produced as a witness on behalf of the libelant, being first duly sworn, on oath testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. What is your full name?

A. John Urbanek.

Q. Mr. Urbanek, you were the chief engineer on the steamer "Alaskan" in September, 1909?

A. Yes, sir.

Q. And you were chief engineer during the times at which these repairs were made for which libelant is suing? A. Yes, sir.

Q. Were you present when Mr. Hutton made arrangements for the making of these repairs?

A. I was.

Q. Just state what arrangements were made.

A. I was hired by a man named Reeves in our association, and was sent to the steamer "Alaskan" at Eagle Harbor to make a survey and find out what repairs were necessary and give the repair list to Mr. Bradford. I went over there on a Monday, I think it was, I was hired on Saturday, and made a general survey of what things were necessary to be done, and made a copy of the list and handed it to Mr. Bradford, and gave it to him and he acknowl-

(Testimony of John Urbanek.)

edged it, and later on, about, I suppose about an hour or two after, I happened to go across the street towards the Colman Dock and there was Mr. Bradford in front of the Hutton shop having the repair list explaining to Mr. Hutton what was necessary to be done on the steamer "Alaskan," and as I was going across he happened to see me and he told Mr. Hutton [18] in my presence the work to be done accordingly, and I was accepted as chief engineer by him also.

Q. Who was Mr. Bradford?

A. Mr. Bradford is manager and an owner of the steamer "Alaskan."

Q. Were these repairs made under your supervision, your direct supervision?      A. Yes, sir.

Q. After they were made, did Mr. Hutton furnish you a statement of the repairs?      .

A. There was a bill came and I signed the bill for the work.

Q. I will ask you to examine this bill, and say if that was the bill furnished for your approval and inspection?

A. Yes, sir, it is correct, with my signature to it.

Q. You signed this in both of these places?

A. I did, yes, sir.

Q. And the work set forth by this statement here was done by the Hutton Machine Works on this boat and under your supervision?      A. Yes, sir, entirely.

Q. You knew at the time this statement was handed you that it was a correct statement of the work done?      A. Yes, sir.



(Testimony of Arthur F. Hutton.)

By Mr. MARTIN.—I will ask to introduce this statement in evidence.

By Mr. ROBINSON.—No objection.

By the COURT.—Statement of account offered by the libelant, purporting to show services rendered and material furnished by the Hutton Machine Works to the steamer “Alaskan,” is offered in evidence by the libelant and received, and marked Libelant’s Exhibit “A.”

No cross-examination. [19]

**[Testimony of Arthur F. Hutton, for Libelant.]**

ARTHUR F. HUTTON, produced as a witness on behalf of the libelant, being first duly sworn, on oath testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. You may state your name. A. A. F. Hutton.

Q. You are the libelant in this case, are you, Mr. Hutton? A. I am.

Q. What business are you engaged in, Mr. Hutton? A. Machine and repair business.

Q. And was so engaged during the time for which the libel was brought? A. I was.

Q. I will ask you what, if any, work you had to do on the steamer “Alaskan” in September and subsequent to September, 1909?

A. General repairs to fit the boat for operation.

Q. How did you happen to make these?

A. Upon the authorization of H. C. Bradford.

Q. Who is H. C. Bradford?

(Testimony of Arthur F. Hutton.)

A. Representative of the Alaska Steamship Company, owners of the vessel "Alaskan,"—the Steamer Alaskan Company.

Q. After you had made these repairs, what did you do then?     A. Presented our bill for them.

Q. Is this bill which has been introduced as Libellant's Exhibit "A," the bill that you presented for them?     A. It is the bill.

Q. Whom did you first present that bill to?

A. Mr. Bradford.

Q. You also presented it to Mr. Urbanek, did you?

[20]

A. I presented it to Mr. Urbanek,—allow me to correct myself. I presented it to Mr. Bradford after Mr. Urbanek's signature.

Q. How is this made up?

A. Made up in the form shown.

Q. From what did you make this bill up?

A. From our time sheets, and bills of material rendered to us from people we bought from.

Q. What became of these time sheets and bills?

A. I believe they are destroyed.

Q. Have you any other showing the time spent and material used?

A. No, this is the only way we keep our books.

Q. And it was made up at that time?

A. At that time.

Q. You know it was correct?

A. I know of my own knowledge it is correct.

Q. And this labor and material was all furnished on that boat at that time?     A. Yes, sir.

(Testimony of Arthur F. Hutton.)

Q. Was anything paid on this account? .

A. About \$154.61 paid on this account.

Q. Who paid that? A. Mr. Bradford.

Q. I will ask whose credit these repairs were made on, whether the credit of the boat or credit of the company? A. Credit of the vessel.

Q. Would you have made these repairs on anything but the credit of the vessel?

A. I would not.

Q. Has this balance or any part of it ever been paid since the payment of \$154.61? [21]

A. Not since.

Q. Have you ever made any effort to collect this balance? A. Several.

Q. Do you know where this boat has been for the past three years, whether or not it has been in the jurisdiction of the United States Court?

A. Been out of the jurisdiction of the United States Court, out in the British Columbia waters, I believe, I know she is.

No cross-examination. [22]

**[Testimony of H. C. Bradford, for Libellant.]**

And afterwards, on the 31st day of October, 1913, at the hour of 2:30 o'clock P. M., personally appeared H. C. BRADFORD, a witness on behalf of the steamship "Alaskan" respondent and intervening claimant, and J. S. Robinson, Esq., Proctor, representing said respondent and intervening claimant; and H. A. Martin, Esq., Proctor for the libellant, and the said witness being first duly sworn, on oath testified as follows:

(Testimony of H. C. Bradford.)

Direct Examination.

(By Mr. ROBINSON.)

Q. Your name is H. C. Bradford?

A. H. C. Bradford, yes, sir.

Q: Mr. Bradford, were you an agent for the owners of the steamship "Alaskan" in September, 1909?     A. Yes, sir.

Q. Who was the owner of the steamship "Alaskan" at that time?

A. Mr. C. H. Black and H. C. Strong.

Q. And was it owned by a corporation?

A. Yes, it was; called the Steamer Alaskan Co., Inc.

Q. Do you mean that they were the holders of the stock of the corporation which owned it?

A. They were the holders of the stock in the corporation.

Q. Did you hold any stock or own any interest in any way yourself?     A. I did not.

Q. As I understand you, you acted as agent for them?     A. Yes, sir.

Q. Mr. Bradford, do you remember, or do you not remember, of ordering some repairs made on the steamship "Alaskan" in the engineer's department in September, 1909?

A. Let me see, there were some repairs that I ordered, yes.

Q. Did you have a talk with Mr. Arthur Hutton concerning some repairs to be made on the steamship "Alaskan" at about that time?

A. I couldn't say what time it was, I don't know;



(Testimony of H. C. Bradford.)

we had some repairs in August, I think. [23]

Q. 1900, in the fall, anyway? A. Yes, sir.

Q. Did you order those certain repairs to be made by Mr. Arthur Hutton, about that time? A. Yes.

Q. Do you remember where you saw Mr. Hutton and talked with him?

A. I think in front of his place of business.

Q. Where was that?

A. I think at that time it was on Railroad Avenue.

Q. Was there any agreement made concerning the payment for these repairs?

A. There was none.

Q. Did Mr. Hutton, or you, either of you, say anything specifically upon what credit these repairs were to be made? A. No, we did not.

Q. I will ask you directly whether or not you told Mr. Hutton that these repairs were to be made on the credit of the vessel.

A. I did not. I didn't order these repairs made as far as the bill goes.

Q. Did you ever, at any time, Mr. Bradford, engage Mr. Hutton to make any repairs on the steamship "Alaskan" under an agreement that the credit of the vessel should be pledged for the payment of the bill? A. No, I did not. [24]

Cross-examination.

(By Mr. H. A. MARTIN.)

Q. You were manager of the Steamer Alaskan Company? A. I was simply acting as agent.

Q. You were designated as manager?

A. Not of the Alaskan.

(Testimony of H. C. Bradford.)

Q. What company were you manager of?

A. Northland Steamship Company.

Q. Was that in existence in 1909? A. Oh, yes.

Q. Is the Steamer Alaskan Company in existence now? A. I think not.

Q. When did it go out of existence?

A. I don't know.

Q. Do you know at about what time?

A. I really don't know anything about it.

Q. What was the reason for the Steamer "Alaskan" going out of existence?

A. Because they chartered her to the Everett Navigation Company.

Q. And afterwards sold her? A. Yes.

Q. What connection did they have with the Ketchikan Steamship Company?

A. The Ketchikan Steamship Company was when she was operated first in carrying mails and afterwards they incorporated her.

Q. In the Steamer "Alaskan"? A. Yes.

Q. The Ketchikan was in existence about the same time as the Steamer Alaskan Company? [25]

A. No, because we finished carrying mails; we retained the Alaskan and sold the other business, and called it the Alaskan, Incorporated.

Q. What was the financial condition of the Steamer Alaskan Company during this year?

A. I couldn't tell you that.

Q. It wasn't very good, was it?

A. Well, it had the value of the boat.

Q. Outside of that, it had no financial resources

(Testimony of H. C. Bradford.)

whatever? A. I don't know; I was simply agent.

Q. You didn't know anything about its finances?

A. No further than the boat.

Q. You know that the reputation this company had was not very good, financially, during that time?

A. No, I do not.

Q. You won't deny that that is a fact?

A. I don't even know; I will not deny anything.

Q. You say Mr. Hutton did not make these repairs through your order?

A. Not the bill that he has brought against us.

Q. What repairs did he make?

A. Previous repairs that were made, and for which we paid.

Q. You knew Hutton was making the repairs during all that time? A. Not during this time.

Q. Do you mean to say you didn't know that he was making of these repairs for which this bill was rendered? A. No, I did not.

Q. And this bill was handed to you after the repairs were made? A. Yes, sir. [26]

Q. What did you tell Hutton then?

A. I told him I didn't know anything about it, the work had been ordered by the engineer of the charter parties.

Q. Didn't the engineer make out a list of the work and take it to you, and you took it to Mr. Hutton at his place of business and have him do the work?

A. Not on this bill.

Q. What bill was it then?

A. It was a previous bill that the engineer made up

(Testimony of H. C. Bradford.)

on a piece of yellow paper like this, which I asked Mr. Hutton to do, that work was done and the bill was paid.

Q. Who was the engineer?      A. Mr. Urbaneck.

Q. All repairs made on this boat were made under the direction of Mr. Urbanisk?

A. The first repairs—the first bill.

Q. And the second bill also?

A. I don't know.

Q. He was the chief engineer of the boat all the time?      A. Yes, sir.

Q. Who was the master of the boat at that time?

A. I don't know.

Q. Don't you know?

A. I had nothing to say as to who the master was to be.

Q. And you don't know who the master of the boat was at the time these repairs were made?

A. No, I don't know.

Q. How much did the bill amount to that you ordered done?      A. I couldn't remember now.

Q. You know who paid that?

A. I must have paid it myself, as the agent. [27]

Q. Did it amount to over \$100?

A. I should think so.

Q. Over \$150?

A. I would think it amounted to more than that.

Q. You never paid anything on this bill at all?

A. Not that I know of.

Q. Do you recollect two bills being presented to you, signed by Mr. Urbanick, the chief engineer?



(Testimony of H. C. Bradford.)

A. No, I don't.

Q. Those were not presented to you at all?

A. I don't know; I don't remember.

Q. Did you ever see this? (Libellant's Exhibit "A.")

A. I must have seen it, but not to remember the amounts.

Q. That is Libellant's Exhibit "A." Did you ever see this signature? A. I don't remember.

Q. You won't deny that these two bills, signed by John P. Urbanick, chief engineer of the steamer "Alaskan," were presented to you at all?

A. No, I won't deny that.

Q. And wasn't the sum of \$154.61 paid by you on this account after Mr. Urbanick signed these bills and presented them to you?

A. I don't know whether it was on that account or not; I think perhaps they ran the bills together. I remember paying one bill for work that I ordered done, but what the amount was I don't remember now.

Q. You don't remember whether it was after this whole bill had been rendered to you or not?

A. No, I don't remember that.

Q. These repairs were necessary to the operation of the boat? [28] A. I don't know that.

Q. Didn't you go and see when Mr. Urbanick asked for repairs to be made?

A. Not for this bill, but the repairs he ordered at first he did.

Q. Didn't you ask Mr. Hutton to go ahead with

(Testimony of H. C. Bradford.)

the repairs that were necessary?

A. No, to make what repairs were ordered by Mr. Urbanick on that slip of paper.

Q. Mr. Strong has not told you that you personally must pay that bill?     A. He did tell me that.

Q. Why did he tell you that?

A. Because he probably thought the repairs had been made under my orders and had to be paid for.

Q. Why did he tell you you personally had to pay that bill?     A. Because I was acting as agent.

Q. And you were making arrangements to pay it at one time, were you not?

A. Yes, at first I said I would pay it.

Q. Now, will you tell me why you said you would pay it at first, when you did not authorize the orders?

A. Simply because they were asking me to pay it.

Q. And you considered that as sufficient reason that you should pay it, although you had never ordered the work done?

A. Because there were other things at issue that would have made a difference to me on other stock in the other company.

Q. It would have made a difference of \$600.00 to you?     A. Yes.

Q. Why didn't they insist on your paying it?

A. I don't know. [29]

Q. Did it make this difference to you when you didn't pay it?     A. It has not as yet.

Q. You won't say that these repairs, represented by these—by this bill here, were not necessary to the operation of the boat, will you?

(Testimony of H. C. Bradford.)

A. I don't know anything about these repairs on this one bill in particular.

Q. When did you order the work done which you now admit you had Hutton do?

A. I couldn't tell the exact date, I think the latter part of August.

Q. The latter part of August? A. I think so.

Q. How long did it take him to do that work?

A. I don't know that.

Q. That was a considerable bill of work, was it not?

A. I don't remember just what it was, it wasn't supposed to be very much, I know, the time before it was ordered.

Q. It took him about two weeks to do the work, didn't it? A. I don't know.

Q. Now, don't you know that the first bill of work that he did amounted to 66 cents over \$601.00?

A. No, I know that we paid the first bill, but I cannot remember the amount.

Q. Will you examine this, exhibit "A," and see if that first bill did not amount to over \$600.00?

A. It totals here, \$601.00, yes, sir.

Q. That was for the first two weeks' work done?

A. I don't know what time was required at this work.

Q. Doesn't the exhibit show here that it was commenced on the 25th of August and finished on the 8th of September? [30] A. It does.

Q. You won't dispute that fact, will you?

A. That is what the exhibit shows, yes, sir.

(Testimony of H. C. Bradford.)

Q. Did you ever order any other repairs on this boat?

A. I couldn't say—I don't know, I am sure; I think Mr. Hutton has done work for us previously at different times.

Q. Through your order?

A. Possibly, through mine, it might have been through the owners.

Q. What other man residing here had active charge of the boat?

A. The owner, Mr. Black, Mr. Strong being here a part of the time. The boat was always subject to their orders.

Q. Mr. Strong was never here?

A. Yes, maybe four or five times a year.

Q. He lives at Ketchikan?     A. Yes.

Q. And Mr. Black seldom ever takes any interest in these enterprises?

A. He does, in inspection of the office occasionally, and advises, but active business management, very seldom.

Q. And very seldom interferes with matters of that kind?

A. No, we generally consult him on repair work.

Q. Can you name any instance when you consulted him concerning repairs?     A. On the "Alaskan"?

Q. Yes.     A. No.

Q. Did you consult him on the repairs Mr. Hutton made under your order—the first bill of repairs?

A. I believe I told him the repairs had to be done before she went under charter. [31]



(Testimony of H. C. Bradford.)

Q. Seattle was the home port of this boat, was it not?

A. I think not, I think Ketchikan, Alaska was, but I am not sure.

Q. Do you still think that Ketchikan, Alaska was?  
(Handing witness letter.)

A. I think so.

Q. Wasn't Mr. Reed the master of the boat at that time?

A. Captain Reed of the Everett Navigation Company was the master I think; he was supposed to be when they made the charater. I am positive that he was acting as master at that time.

Q. Are any of the officers of the company resident here, now? A. No, I don't think so.

Q. When will Mr. Strong be here?

A. I don't know that, perhaps in December, maybe the last part of November.

Q. Did you ever talk to the master concerning these repairs. A. I don't know whether I did or not.

Q. When you chartered the boat it was your agreement and that you would put the boat in good operating condition?

A. Agreed to do certain things as their engineer asked for?

Q. What do you mean by "certain things their engineer asked for"?

A. We agreed to do, to have done the work that Mr. Urbanick showed me and which I asked Mr. Hutton to do, and for which I paid, as you see, amounting to \$600.00; that was the work to be done,

(Testimony of H. C. Bradford.)

although I had forgotten the amount of the bill.

Q. Did you pay the \$600.00?

A. I don't know. [32]

Q. Who authorized you to make this agreement and have these repairs paid for?

A. The owners, I suppose.

Q. You did have authority to make that agreement then? A. Acting as agent I did, yes, sir.

Q. From the owners? A. Yes, sir.

Q. And you made that agreement under their direction?

A. There was nothing said about it, I think, in this case.

Q. They knew you made the agreement, did they not?

A. I don't know whether they did or not, I am not sure.

Q. Did they ever raise any objection to your making the payment on the account?

A. The question never came up.

Q. They would know in due course of time that the payment had to be made? A. Oh, yes.

Q. And they never questioned it?

A. Not to my knowledge.

Q. Would you undertake to make that sort of an agreement without any consultation with the owners?

A. No, I would not.

Q. Then you did consult them?

A. About the charter, but I couldn't say about the work it is so far back I couldn't remember.

Q. You will admit, won't you, that Hutton filed a

certified of assumed name with the clerk of Supreme Court?

By Mr. ROBINSON.—Yes, we admit that. [33]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as Hutton  
Machine Works,

Libelant,

vs.

Steamship “ALASKAN,” Her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**[Testimony of Arthur F. Hutton, for Libelant  
(Recalled)].**

On the 6th day of June, 1914, at the hour of 1 o'clock in the afternoon, personally appeared ARTHUR F. HUTTON, witness on behalf of the libelant, and H. A. Martin, Esq., Proctor, representing said libelant; and J. S. Robinson, Esq., Proctor for the respondent and intervening claimant, and the said witness having been heretofore sworn, on oath further testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. Mr. Hutton, when Mr. Bradford was here tes-

(Testimony of Arthur F. Hutton.)

tifying, he testified that this work that you did was not all included in the list that Mr. Urbaneck made up for the work to be done; I will ask you if all of this work included in the list from August 25th to September 8th, which is exhibit "A," was the list prepared by Urbaneck?

A. To my recollection and knowledge I believe yes.

Q. Were these repairs that you made at that time necessary repairs to be made for the operation of the boat? [34] A. Absolutely.

Q. Had you done work for these people before?

A. On several occasions.

Q. How had you charged on other occasions?

A. To the vessel direct?

A. And the bills had always been rendered to Bradford, charged to the boat direct?

A. Charged to the boat, rendered to the company's office.

Q. Would you have done the work that was done on this boat on anything except the credit of the vessel? A. Absolutely not.

Q. All of the labor and material represented by exhibit "A" here went into that boat? A. It did.

Cross-examination.

(By Mr. ROBINSON.)

Q. Mr. Hutton, had you previously done work on this particular boat, the "Alaskan"?

A. Not to my recollection.

Proctor for Libelant offerene in evidence a dupli-



(Testimony of Arthur F. Hutton.)

cate certificate of registry No. 2-A of the steamship called the "Alaskan of Ketchikan," issued at Port Townsend, Washington, March 19, 1906, and there being no objection on part of the counsel for the claimant the same is admitted in evidence, marked exhibit "B."

All of which is respectfully reported to the Court.  
July 3, 1914.

WM. D. TOTTEN,  
Commissioner. [35]

[Indorsed]: Testimony of Witnesses. Filed in the U. S. District Court, Western Dist. of Washington, July 3, 1914. Frank L. Crosby, Clerk. By \_\_\_\_\_, Deputy. [36]

[Opinion.]

*United States District Court, Western District of  
Washington, Northern Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant,

vs.

Steamship "ALASKAN," Her Boilers, etc.,  
Respondents.

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

Filed September 8, 1914.

H. A. MARTIN, for Libellant.

BRONSON & ROBINSON, for Respondent  
and Intervening Claimant.

NETERER, District Judge:

It is agreed by the parties to this action that if a lien exists, it is by virtue of the law of Washington. The question for decision is, were the repairs made on the steamship "Alaskan" by the libellant, done upon the credit of the vessel? The testimony shows that the repair work was charged to the vessel and not to the owner, and that it was the intention of the libellant to hold the vessel. The testimony is conclusive, however, that there was no understanding between the parties that the vessel should be held for the work. There was nothing said to or by the owners of the vessel or their agent that the vessel was to be held. The credit of the vessel rested solely with the libellant. It has been held by an unbroken line of decisions by the Circuit Court of Appeals of this Circuit, that for the purpose of establishing a lien against a vessel under the laws of the State, it is essential to the validity of the lien that the work be done upon the credit of the ship, and that both parties to the transaction so understood it—*Alaska & Pacific Steamship Co. v. The Chamberlain*, 116 Fed. 600; *The F. A. Kilbourne*, 179 Fed. 107. This rule has been followed in other [37] *other* Circuits—*The Alligator*, 153 Fed. 219; *The William P. Donnelly*, 156 Fed. 305; *The Goldenrod*, 151 Fed. 9.

The contention that this case falls within the holding of the Circuit Court of Appeal in "The Bainbridge," 210 Fed. 620, is not well taken. In that case it was understood that the engines which were furnished were to be held until paid for. Judge Gilbert, for the Court, said,

"There was an understanding that the appellant was to hold the engines until final payment was made. The engines representing almost the entire outlay of the appellant, having gone into the vessel, there was no way by which the appellant could hold the engines otherwise than by holding the vessel. The owner must have understood that the vessel was liable for the material and machinery so furnished at the time this work was being done. King & Winge, who were making repairs, were told by the owner, 'The boat is good for the work,' "

and Judge Gilbert further stated:

"In view of the terms of the lien law and the fact that in the present case the appellant furnished valuable machinery which became part and parcel of the vessel, slight evidence should be required to establish the fact that the work was done and the material furnished on the faith and credit of the vessel, especially where, as here, there is an entire absence of evidence to indicate a contrary intention."

In the instant case, there is an utter absence of evidence to show that there was any sort of an understanding or anything upon which to predicate an inference as to such understanding on the part of

the owner. "The Bainbridge" does not change the rule that to maintain a lien on a vessel, under a state statute, it must be contemplated by both parties, and the testimony not bringing libellant within this rule, a decree for respondents is directed.

JEREMIAH NETERER,

Judge.

[Indorsed]: Opinion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 8, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [38]

**[Opinion on Petition for Rehearing.]**

*United States District Court, Western District of  
Washington, Northern Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant.

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.



Filed October 15, 1914.

ON PETITION FOR REHEARING AND RE-  
CONSIDERATION OF DECISION. PETI-  
TION DENIED. DECREE FOR RESPOND-  
ENTS DIRECTED.

H. A. MARTIN, for Libelant.

BRONSON & ROBINSON, for Respondent  
and Intervening Claimant.

NETERER, District Judge:

On September 8, 1914, a decision was filed in the  
above cause in which the court said that,

“The testimony shows that the repair work  
was charged to the vessel and not to the owner,  
and that it was the intention of the libelant to  
hold the vessel. The testimony is conclusive,  
however, that there was no understanding be-  
tween the parties that the vessel should be held  
for the work. There was nothing said to or by  
the owners of the vessel or their agent that the  
vessel was to be held. The credit of the vessel  
rested solely with the libelant. It has been held  
by an unbroken line of decisions by the Circuit  
Court of Appeals of this Circuit that for the  
purpose of establishing a lien against a vessel,  
under the laws of this state, it is essential to the  
validity of the lien that the work be done upon  
the credit of the ship, and that both parties to  
the transaction so understood it. *Alaska & Pa-  
cific Steamship Co. v. The Chamberlain*, 116  
Fed. 600; *The F. A. Kilbourne*, 179 Fed. 107.  
This rule has been followed in other Circuits.

The Alligator, 153 Fed. 219; The William P. Donnelly, 156 Fed. 305; The Goldenrod, 151 Fed. 9."

Libelant was seeking to establish a lien under the state law upon the "Alaskan" for repairs made. It was held that in the [39] instant case there was an utter absence of evidence to show that there was any understanding upon which to predicate an inference on the part of the owner that the repairs were furnished upon the credit of the vessel, and a decree for respondents was directed.

A petition for rehearing has been filed, in which it is contended that the decision is contrary to law, and further, that while the libelant seeks to foreclose a lien under the state law, it is established by the evidence that the vessel belonged to a foreign port, and that a lien under the general admiralty law attached. The testimony shows that the vessel was owned by a Washington corporation. The registration shows the vessel to be owned by a Washington corporation, but that her home port is Ketchikan, Alaska. I am satisfied with the former holding that no lien attached under the state statute. In *The Bainbridge*, 210 Fed. 620, Judge Gilbert, for the Circuit Court of Appeals, said:

"There was an understanding that the appellant was to hold the engines until final payment was made. The engines representing almost the entire outlay of the appellant, having gone into the vessel, there was no way by which the appellant could hold the engines otherwise than by holding the vessel. The owner must have

understood that the vessel was liable for the material and machinery so furnished at the time this work was being done. King & Winge, who were making repairs, were told by the owner, 'The boat is good for the work,' "

and,

"In view of the terms of the lien law and the fact that in the present case the appellant furnished valuable machinery which became part and parcel of the vessel, slight evidence should be required to establish the fact that the work was done and the material furnished on the faith and credit of the vessel, especially where, as here, there is an entire absence of evidence to indicate a contrary intention."

In the instant case, there is no evidence of any character which would indicate that the claimant understood that the repairs would be done upon the credit of the ship, although such may have been [40] the secret determination and conclusion of libellant. There is no testimony to take the case out of the rule established by the Circuit Court of Appeals.

The only question that remains for determination is, where is the home port? This matter must be determined upon precedent and not upon reason.

"Materialmen who furnish materials \* \* \* in a port other than a port of the state where the vessel belongs, have a maritime lien on the vessel therefor."

“But not for materials and supplies furnished to a vessel in her home port.”

(*The Belfast*, 7 Wall. 74 U. S. 645.)

“A maritime lien does not arise for repairs made and supplies furnished in the home-port of the vessel. *The General Smith*, 4 Wheaton.”

(*The Kalorama*, 77 U. S. 211, 10 Wall.)

Circuit Judge Dillon in “*The Albany*,” Vol. 1, Federal Cases, No. 131, page 288, holds that the residence of the owners determines whether the vessel is foreign or domestic, and not her enrollment, where the two are different, and quotes as follows:

“The admiralty has a clear jurisdiction to maintain such suits whenever the supplies have been furnished to the vessel in a foreign port, and every port is foreign to her which is not in the same state to which she belongs, so the doctrine was laid down in the case of the ‘*General Smith*,’ and it has never, to my knowledge, been in the slightest degree departed from. ‘Ports of states, other than those of the state where the vessel belongs,’ says Clifford, Judge, ‘are considered as foreign ports.’ *The Lulu*, 77 U. S. 200, 10 Wallace.”

“The term ‘foreign port’ in the jurisprudence of the United States, includes all maritime ports other than those of the state where the vessel belongs. *Burke v. ‘The Richmond,’* Case No. 2, 161; “‘*The Lottawanna*,’ 21 Wall. 88 U. S. 594).”

In that case “*The Albany*” was owned at a City in Wisconsin and was enrolled at Galena, in Illinois,



the nearest collector's office to the residence of the owner. Necessary [41] supplies were furnished by the libelant to the vessel at La Cross, Wisconsin. The court held that the libelant was not entitled to a maritime lien on the vessel, and concluding, stated that "The Albany"

"belonged to the State of Wisconsin, and that every port in that state was, as respects materialmen, the home port of the vessel. The libelant residing in and extending credit in that state, is, under the view of the Supreme Court, conclusively presumed to have extended it to the owner who resided in the state, or to the master, and has no implied or maritime lien on the vessel."

The owner, in the instant case, being a Washington corporation, is necessarily a resident of Washington, and every port in Washington, as respects materialmen, would be the home port of the vessel. *St. Jago De Cuba*, 9 Wheaton, 409. "*The Alaskan*" being owned by a Washington corporation, enrolled at the collector's office in the State of Washington, but with a recitation in the enrollment that the home port was Ketchikan, must be held to belong to Washington, and a lien not being established under the laws of this state, and a lien under the general maritime law not obtaining, a decree for respondents is directed.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Opinion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Di-

vision, Oct. 15, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [42]

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, etc.,  
Respondent.

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Claimant.

### **Decree of Dismissal.**

This matter coming up to be heard on this 2d day of December, 1914, upon motion of the claimant, British Columbia Marine Ry. Co., Ltd., a corporation, for the entry of a decree dismissing the libel of the libelant, Arthur F. Hutton, doing business as Hutton Machine Works; and it appearing that this cause was heard upon the pleadings and proof and after argument of counsel for the respective parties, the court entered its memorandum decision, finding that the evidence failed to prove that there was any pledge of the vessel, and that the libelant was not entitled to a lien; and the motion to rehear the same having been made by the libelant; and after full argument a second memorandum decision having been filed finding that the libelant, Arthur F. Hut-

ton, doing business as Hutton Machine Works, was not entitled to a lien:

IT IS NOW ORDERED, ADJUDGED AND DECREED by the Court that the libel of Arthur F. Hutton, doing business as Hutton Machine Works, be and the same is hereby dismissed; and it is further ordered and decreed that the claimant, British Columbia Marine Ry. Co., Ltd., a corporation, recover from the said libelant its costs herein to be taxed. Done in open court this 2d day of December, 1914.

JEREMIAH NETERER,  
Judge. [43]

Approved as to form.

H. A. MARTIN,  
Proctor for Libelant.

[Indorsed]: Decree of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 2, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy. [44]

*In the District Court of the United States for the  
Western District of Washington.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN." Her Boilers, Engines,  
Machinery, Boats, Apparel, and Furniture,  
Respondents,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Notice of Appeal.**

To steamship "Alaskan," Respondent; British Columbia Marine Ry. Co., a corporation, Intervening Claimant, and to Bronson & Robinson, and to R. S. Jones, their Proctors.

You and each of you will please take notice that Arthur F. Hutton, doing business as Hutton Machine Works, the libelant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered herein on or about the second (2d) day of December, A. D. 1914, and from each and every part thereof.

Dated this 4th day of May, A. D. 1915.

H. A. MARTIN,  
Proctor for Libelant.

Service of within Notice of Appeal and receipt of copy admitted this 4th day of May, 1915.

BRONSON, ROBINSON & JONES,  
Proctors for Respondent and Claimant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [45]



*In the District Court of the United States for the  
Western District of Washington.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant,

vs.

Steamship "ALASKAN." Her Boilers, Engines,  
Machinery, Boats Tackle, Apparel and Furni-  
ture,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Order Allowing Appeal.**

On the motion of H. A. Martin, Proctor for the libellant and appellant herein it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore made, rendered and entered herein, be and the same is hereby allowed.

IT IS FURTHER ORDERED that the bond on appeal herein be the sum of Two Hundred Fifty (\$250.00) Dollars.

Done in open Court this 4th day of May, A. D. 1915.

JEREMIAH NETERER,

Judge.

Service of within Order Allowing Appeal and receipt of copy admitted this 4th day of May, 1915.

BRONSON, ROBINSON & JONES,

Proctors for Respondent and Claimant.

[Indorsed]: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [46]

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUTTON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines, Machinery, Boats Tackle, Apparel and Furniture,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we the undersigned libelant, Arthur F. Hutton, doing business as Hutton Machine Works, as principal, and National Surety Company, as surety, are held and firmly bound unto the Respondent, S. S. "Alaskan," and to the intervening claimant,

British Columbia Marine Ry. Co., Ltd., a corporation, in the above-entitled cause, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, lawful money of the United States of America, to be paid to the S. S. "Alaskan," respondent, and the British Columbia Marine Ry. Co., Ltd., a corporation, intervening claimant, their successors and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Signed with our seals, signed and dated this 4th day of May, A. D. 1915. [47]

Whereas, lately at the District Court of the United States for the Western District of Washington, in Admiralty, in a suit pending in said court between the libelant and the respondent, S. S. "Alaskan," and the British Columbia Marine Ry. Co., Ltd., a corporation, intervening claimant, a decree was entered against the libelant dismissing the libel of the libelant and awarding costs against the libelant, and the libelant has filed herein his notice of appeal from said decree and each and every part thereof to the United States Circuit Court of Appeals for the 9th Circuit to be hereafter held in the City of San Francisco, State of California;

Now, therefore, the condition of the obligation is such that if the said libelant shall prosecute the said appeal to effect and answer all damage and costs if he fails to make his appeal good, then the above

obligation to be void; otherwise to remain in full force and effect.

ARTHUR F. HUTTON,

By H. A. MARTIN,

His Proctor.

NATIONAL SURETY COMPANY.

[Seal]

By GEO. W. ALLEN,

Attorney in Fact.

Service of within Bond and receipt of copy admitted this 4th day of May, 1915.

BRONSON, ROBINSON & JONES,

Proctors for Claimant.

[Indorsed]: Appeal Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [48]

*In the District Court of the United States for the Western District of Washington.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUTTON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, Tackle, Apparel and Furniture,  
Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.



### **Assignment of Errors.**

Comes now the libelant herein, being the appellant in the above-entitled matter, and hereby assign errors in the decision and the decree heretofore made herein, and for such assignment of error says:

#### **I.**

That the Court erred in holding that the evidence failed to prove that there was any agreement, understanding or consent on the part of the owner of the steamer "Alaskan" that the said steamer should be subject to a lien in favor of the libelant, on account of the labor performed and the material furnished, and on account of which the libel was filed herein.

#### **II.**

That the Court erred in holding that the evidence failed to prove that the libelant, in fact, relied upon the credit of the steamer "Alaskan" in performing the labor and furnishing the labor and material and upon account of which the said libel was filed herein.

#### **III.**

That the Court erred in holding as a matter of law [49] that it was necessary to prove that there was an agreement, understanding or consent on the part of the owner of the steamer "Alaskan," that the labor performed, was performed, and the material furnished, was furnished, on the credit of the "Alaskan" in order to subject the vessel to a lien for the labor performed and material furnished.

#### **IV.**

That the Court erred in entering a decree in favor of the intervening claimant and the respondent, and

in refusing to enter a decree in favor of the libelant.

WHEREFORE, the libelant, appellant herein, prays that the decree of the trial court be reversed as to him and that the District Court be directed to enter a decree for him for the full amount established by the evidence, together with interest thereon and his costs.

H. A. MARTIN,  
Proctor for Libelant.

Service of within assignment of errors and receipt of copy admitted this 4 day of May, 1915.

BRONSON, ROBINSON & JONES,  
Attorneys for Respondent and Claimant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western District of Washington, Northern Division, May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [50]

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent,

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,  
Intervening Claimant.

**Order to Transmit Original Exhibits.**

Now on this 12th day of May, 1915, upon motion of H. A. Martin, and for sufficient cause appearing, it is ordered that Libelant's Exhibits "A" and "B" filed and introduced as evidence upon the trial of this cause, be by the clerk of this court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered together with the transcript of the record on appeal in this case.

JEREMIAH NETERER,  
District Judge.

[Indorsed]: Order to Transmit Original Exhibits.  
Filed in the U. S. District Court, Western Dist. of  
Washington, May 12, 1915. Frank L. Crosby, Clerk.  
By E. M. L., Deputy. [51]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, Boats, Tackle, Apparel and Furni-  
ture,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Praeipie [for Apostles on Appeal].**

To the Clerk of the Above-entitled Court:

Please kindly prepare for the Apostles on Appeal herein the following:

I. Libel, answer, stipulation for amendment of libel and amended libel.

II. Testimony in case including all exhibits:

III. Both opinions of Court on file:

IV. Final decree, and notice of appeal.

V. Assignments of error.

VI. H. A. MARTIN,

Proctor for Libelant and Appellant.

I waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105, of this Court.

H. A. MARTIN,

Attorney for Libelant and Appellant. [52]

[Indorsed]: Praeipie. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [53]



*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, Boats, Tackle, Apparel, and Fur-  
niture,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Citation [Copy].**

To Steamship "Alaskan," Respondent and British  
Columbia Marine Ry. Co., Ltd., a corporation,  
Intervening Claimant, appellees herein:

WHEREAS, the libelant, Arthur F. Hutton, doing  
businesss as the Hutton Machine Works, has ap-  
pealed to the United States Circuit Court of Appeals  
for the 9th Circuit from the decree lately rendered  
by the United States District Court for the Western  
District of Washington, dismissing the libel of the  
libelant and awarding costs against the libelant, and  
on said appeal has filed security as required by law;

THEREFORE, you are hereby cited to appear be-  
fore the United States Circuit Court of Appeals for

the 9th Circuit at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof to do and receive what may pertain to justice to be done in the premises. [54]

Given under my hand at the City of Seattle in the District above named on the 4th day of May in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States, the one hundred and thirty-ninth.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 4th day of May, 1915, and of the Independence of the United States, one hundred thirty-ninth.

JEREMIAH NETERER,  
United States District Judge Presiding in the United States District Court for the Western District of Washington, Northern Division.

[Seal] Attest: FRANK L. CROSBY,  
Clerk of the United States District Court, for the Western District of Washington, Northern Division.

Service of within Citation and receipt of copy admitted this 4th day of May, 1915.

BRONSON, ROBINSON & JONES,  
Proctors for Claimant and Respondent.

[Indorsed]: No. 2212. In the District Court of the United States for the Western District of Washington, Northern Division. Arthur F. Hutton, Libellant, vs. Steamship "Alaskan," Respondent, and British Columbia Marine Ry. Co., Intervening Claimant. Citation. Filed in the U. S. District

Court, Western Dist. of Washington, Northern Division. May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [55]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libellant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent.

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,

Intervening Claimant.

**Certificate of Clerk U. S. District Court to Apostles.**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 55 typewritten pages, numbered from 1 to 55, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is

called for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington. [56]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the libelant and appellant for making record, certificate or return, to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 108 folios at 15c.....	\$16.20
Certificate of Clerk to transcript of record— 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits—3 folios at 15c.....	.45
Seal to said Certificate.....	.20
Total.....	\$17.65

I hereby certify that the above cost for preparing and certifying record amounting to \$17.65, has been paid to me by H. A. Martin, Esq., Proctor for Libelant and Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.



IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 13th day of May, 1915.

[Seal]

FRANK L. CROSBY,  
Clerk U. S. District Court. [57]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, Boats, Tackle, Apparel and Fur-  
niture,

Respondent,

and

BRITISH COLUMBIA MARINE RY. CO., LTD.,  
a Corporation,

Intervening Claimant.

**Citation [Original].**

To Steamship "Alaskan," Respondent and British  
Columbia Marine Ry. Co., Ltd., a corporation,  
Intervening Claimant, appellees herein:

WHEREAS, the libelant, Arthur F. Hutton, do-  
ing business as the Hutton Machine Works, has ap-  
pealed to the United States Circuit Court of Appeals  
for the 9th Circuit from the decree lately rendered  
by the United States District Court for the West-

ern District of Washington, dismissing the libel of the libelant and awarding costs against the libelant, and on said appeal has filed security as required by law;

THEREFORE, you are hereby cited to appear before the United States Circuit Court of Appeals for the 9th Circuit at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof to do and receive what may pertain to justice to be done in the premises. [58]

Given under my hand at the City of Seattle in the District above named on the 4th day of May in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States, the one hundred and thirty-ninth.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 4th day of May, 1915, and of the Independence of the United States, one hundred thirty-ninth.

JEREMIAH NETERER,  
United States District Judge, Presiding in the  
United States District Court for the Western  
District of Washington, Northern Division.

[Seal] Attest: FRANK L. CROSBY,  
Clerk of the United States District Court, for the  
Western District of Washington, Northern Division. [59]

Service of within Citation and receipt of copy admitted this 4 day of May. 1915.

BRONSON, ROBINSON & JONES,  
Proctors for Claimant and Respondent.

[Endorsed]: No. 2212. In the District Court of the United States, for the Western District of Washington, Northern Division. Arthur F. Hutton, Libellant, vs. Steamship "Alaskan," Respondent, and British Columbia Marine Ry. Co., Intervening Claimant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [60]

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[Endorsed]: No. 2609. United States Circuit Court of Appeals for the Ninth Circuit. Arthur F. Hutton, Doing Business as Hutton Machine Works, Appellant, vs. British Columbia Marine Railway Company, Limited, a Corporation, Claimant of the Steamship "Alaskan," Her Boilers, Engines, Machinery, Boats, Apparel and Furniture, Appellee. Apostles. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 17, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 2212.

ARTHUR F. HUTTON, Doing Business as HUT-  
TON MACHINE WORKS,

Libelant,

vs.

Steamship "ALASKAN," Her Boilers, Engines,  
Machinery, etc.,

Respondent,

BRITISH COLUMBIA MARINE RAILWAYS  
COMPANY, LTD., a Corporation,

Intervening Claimant.

**Certificate of Clerk U. S. District Court to Original  
Exhibits.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the original exhibits introduced and used upon the hearing and trial of the above-entitled cause as follows: Libelant's Exhibits "A" and "B," which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the transcript of the record on appeal in the above-entitled cause; which said exhibits are so transmitted



pursuant to the order of the said District Court so directing, a copy of which said order will be found on page 51 of the record on appeal in said above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 13th day of May, 1915.

[Seal]

FRANK L. CROSBY,  
Clerk U. S. District Court.

[Endorsed]: No. 2609. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court re Exhibits. Filed May 17, 1915. F. D. Monckton, Clerk.

**[Libelant's Exhibit "A"—Invoices.]**

Seattle, Wash., September 16, 1909.

M. Str. "Alaskan."

To HUTTON MACHINE WORKS, Dr.

Telephone Main 356

Independent 356

Flyer Dock, Railroad Ave.

Aug. 25 to Sept. 8th.

Machinists at Winslow

Refitting engine, boiler and auxiliaries.

Renew pump rods.

Repair glands.

Repair wench.

Rebabbitt, bore and fit 2 sets crank brasses.

Repair H. P. Valve and stem.

Refit H. P. link.

Straighten eccentric rods.

Renew link pins.

Rebush stuffing box glands.

Machine time 343 hours..... .60 204 80

Overtime to 12 p. m., 93 hours..... .90 83 70

" after 12 p. m., 58 hours....1.20 59 60

Help 86 hours..... .40 34 40

Pipe fitters, 36 hours..... .60 21 60

15#-7/8 Tobin bronze..... .38 5 70

2 screw pulleys..... 30

Dress chisels ).

Make Packing hooks)

" scrapers )

" 1 fire hoe )

" 1 reverse arm) 16 75

30# nickel babitt..... .48 14 40

---

 Forward.....\$441.25

Forward.....	441	25
2½# ¼ brass pipe.....		88
Repair oilers .....	3	00
1-4" pipe flange.....		95
1-3 x 4 bushing .....		46
16"-3" black pipe.....		30
1-3" close nipple.....		15
1-5 x 14 gal. nipple.....		83
1-3" ver. check valve.....	6	75
1-4 x 2½ gal. nipple.....		25
2-¾ x ¼ brass reducers.....		35
1-1½ link angle valve.....	3	41
1 yd. each 1/16 and 1/8 anchor sheet packing 19½# .....	.60	11 70
13½-5/16-¾-½ & 5/8 Dods C. E. pack- ing .....	.90	12 15
1 ball asbestos wicking.....		15
1-1½ chime whistle \$44.00, 50%.....		22 00
12-¾ x 15½ Durox guage glasses.....		4 50

Forwarded.....

\$509 08

Forward.....	543 28
Expenses at Winslow.....	6 50
1-12" flat bastard file )	
1-12" half round bastard file).....	1 00
10# cast bronze..... .38	3 80
3¾ & 2-5/8 hex. nuts.....	46
24 Plumbers candles.....	1 92
1 piece 1/16 King sheet packing 3#.. .85	2 25
900# Grate bar casting 3¾.....	33 75
Pattern .....	5 25
1-1½ link check valve.....	2 25
3# copper wire.....	1 20
<hr/>	
Total.....	\$601.66
2 days boilermaker helper.....	\$ 20.00
<hr/>	
	\$621.66
Nov. 2nd, 1909 Credit cash.....	154.61
<hr/>	
Bal.	467.05

JOHN P. URBANEK,

Chief Engineer Str. Alaskan.



Forward.....	509 08	
2 doz. $\frac{3}{4}$ gauge glass washers.....	40	
2# 2 grease cups.....	3 25	
2- $\frac{3}{4}$ gauge cocks.....	2 20	
1 pair 8" pliers.....	1 35	
1 Scoop shovel.....	1 00	
5# Graphite .....	1 10	
1-1 $\frac{1}{2}$ x 1 $\frac{1}{4}$ bushing .....	05	
1-1 gal. oil can.....	25	
1 Tin funnell.....	10	
3-2" x 1 $\frac{1}{2}$ hose bushing and nipple...	1 90	
1-2" hose coupling.....	1 35	
1- $\frac{3}{4}$ Butterfly valve.....	1 50	
1 Sheet 1/16 Klingrite packing 6 $\frac{1}{2}$ #..	1.00	6 50
16 valves for air and feed pumps 6#..	.75	4 50
1 Gauge glass cutter.....	1 25	
37- $\frac{1}{2}$ # Red and white lead.....	3 75	
1- $\frac{1}{2}$ " & 1- $\frac{5}{8}$ Round files.....	1 00	
1-4" stop valve bonnet and stem.....	2.75	\$543.28

Seattle, Wash., Feb. 19th, 1912.

M. Steamer Alaskan.

# STATEMENT

To HUTTON MACHINE WORKS, Dr.

1314 Post Street.

Telephone Main 356	Independent 356
Bal. due invoice Sept. 16th, 1909.....	467.05
Due Invoice Sept. 30th, 1909.....	133.82 \$600.87

Seattle, Wash., 9/30, 1909.

M. Str. "Alaskan."

To HUTTON MACHINE WORKS, Dr.

Telephone Main 356

Independent 356

Flyer Dock, Railroad Ave.

9/20 to 28.

Make boiler studs.

Chase pump cover and steam chest head.

Make nut for 2" valve and thread hub.

Face, drill &amp; fit taper flange to condenser.

Machine work 23 hours..... .60 13 80

1 Engineer 36 hours..... .60 21 60

18 hours on boiler..... .60 10 80

2-3/4 Street ells..... 20

1-1 1/2 plug ..... 08

3-3/4 Cap screws..... 30

1 Fire hoe made..... 4 50

Pipe fitters, per attached bill..... 73 04

2 1/2 boxes plumbers candles..... 8 00

1-4" pipe flange..... 1 50

---

 133.82

JOHN P. URBANEK,

Chief Engineer Str. Alaskan.

[Endorsed]: Exhibit "A." Libellant's Exhibit "A" Rec'd and Filed Dec. 10, 1912. Wm. D. Totten, U. S. Commr. No. 2212. Filed in the U. S. District Court, Western Dist. of Washington, Jul. 3, 1914, Frank L. Crosby, Clerk. By \_\_\_\_\_, Deputy.

No. 2609. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 17, 1915. F. D. Monckton, Clerk.

## [Libelant's Exhibit "B"—Certificate of Registry.]

Insert "Permanent" or "Temporary" THE Official No. Letters  
 Permanent UNITED STATES OF AMERICA  
 Register No. 2-A Department of Commerce and Labor 91866

## BUREAU OF NAVIGATION

Rebuilt at Ballard, Wn., 1906. Duplicate Measured: ....., 1....  
 Remeasured: ....., 1.... CERTIFICATE OF REGISTRY Number of Crew, Nine

In Pursuance of Chapter One, Title XLVIII, "Regulation of Commerce and Navigation,"  
 Revised Statutes of the United States,

<sup>1</sup> H. C. Strong, of Ketchikan, Alaska, President, having taken and subscribed the  
 oath <sup>2</sup>.....required by law, and having sworn <sup>3</sup>..... that <sup>4</sup> the S. S. Alaskan, in-  
 corporated, a corporation organized under the laws of the State of Washington,.....

.....the only owner  
 of the vessel called the Alaskan, of Ketchikan whereof J. E. Anderson is at  
 present master, and is a citizen of the United States, and that the said vessel  
 was built in the year 1886, at Oucatta, Oregon of <sup>5</sup> wood as appears by <sup>6</sup> Per.  
 certificate of enrollment No. 110, issued at Pt. Townsend, Wn., Mar. 19, 1906;  
 surrendered "Home port & trade changed" and <sup>7</sup> said enrollment having certi-  
 fied that the said vessel is a (I. P.) St.s.; that she has One deck, Two mast,...,  
 a Sharp head, and an Elliptic stern; that her register length is 96 5/10 feet, her  
 register breadth 19 0/10 feet, here register depth 7 1/10 feet, her height  
 .../10 feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck.....	75	45
Capacity between decks above tonnage deck.....		
Capacity of inclosures on the upper deck, viz:.....	41	08
.....		
Gross Tonnage.....	116	
Deductions under Section 4153, Revised Statutes, as amended by Act of March 2, 1895:		
Crew space 7.67; Master's cabin.....	7	67
Steering gear...; Anchor gear...; Boatswain's stores...;		
Chart house...; Donkey engine and boiler.....		
Storage of sails.; Propelling power 37.28.....	37	28
Total Deductions.....	44	95
Net Tonnage.....	71	

The following-described spaces, and no others, have been omitted, viz:....  
 .....  
 and the said <sup>8</sup> H. C. Strong having agreed to the discription and admeasure-  
 ment above specified, according to law, said vessel has been duly registered at  
 this Port.

GIVEN under my hand and seal, at the Port of Ketchikan, Alaska, this 15th  
 day of September, in the year one thousand nine hundred and six.

[Place for Seal  
 of  
 Naval Officer.]

No  
 Naval Officer.

[Place for Seal (Sgd.) JOHN L. ABRAMS,  
 of Deputy Collector of Customs.  
 Collector.]

<sup>1</sup> Insert name and address of person by  
 whom oath or affirmation was made.

<sup>2</sup> Substitute "affirmation" when neces-  
 sary.

<sup>3</sup> Substitute "affirmed" when necessary.

<sup>4</sup> If there is only one owner, write "he"  
 or "she"; if more than one owner, write  
 "he (or she) owning" and the part owned,  
 "together with" followed by the names of  
 other owners, their shares and addresses.

<sup>5</sup> Write "wood," "iron," "steel," or as re-  
 quired.

<sup>6</sup> Cite surrendered marine document or  
 write "certificate of ...., builder..," if first  
 document of a new vessel.

<sup>7</sup> Write "said register," "said enrollment,"  
 or "said license." In the first document of a  
 new vessel, give the name and title of the  
 measurer.

<sup>8</sup> In the first document of a new vessel, give  
 the name of the person countersigning cer-  
 tificate of measurement.

[Place for Seal of  
 Department of  
 Commerce and Labor]

EUGENE TYLER CHAMBERLAIN,  
 Commissioner of Navigation.

*Arthur F. Hutton vs.*

Office of Collector of Customs,  
 District of Alaska  
 Port of Juneau

I hereby certify the within to be a true copy of the original on record in this Office.

Given under my hand and seal this 18th day of November, 1913.

J. F. PUGH,  
 Deputy Collector of Customs.

[Endorsed]:

Exhibit "B" Libellant.

Cat. No. 1266

Department of Commerce and Labor

Bureau of Navigation

Permanent

(Permanent or Temporary)

Duplicate

CERTIFICATE OF REGISTRY

No. 2-A

of the

St. s.

called the

Alaskan

of

Ketchikan

116 gross, 71 net,

..

issued at the

Port of Port Townsend, Wash.

March 19th, 1906.

Where Surrendered:

Ketchikan

When Surrendered:

June 24, 1910

Why surrendered

Sold to Alien

J. F. PUGH,  
 Dep. Coll. of Customs.

Libellant's Exhibit "B." Recd. & Filed June 6, 1914. Wm. D. Totten, Commissioner. No. 2212. Filed in the U. S. District Court, Western Dist. of Washington. Jul. 3, 1914. Frank L. Crosby, Clerk. By . . . . ., Deputy.

No. 2609. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 17, 1915. F. D. Monckton, Clerk.



No. 2609

---

IN THE  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

ARTHUR F. HUTTON, doing  
business as Hutton Machine  
Works, *Appellant,*  
*vs.*

BRITISH COLUMBIA MA-  
RINE RAILWAY COMPANY,  
LIMITED, a corporation, claim-  
ant of the Steamship "Alaskan,"  
Her Boilers, Engines, Machin-  
ery, Boats, Apparel and Furni-  
ture, *Appellee.*

---

**Brief of Appellant**

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H. A. MARTIN, Proctor for Appellant.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ARTHUR F. HUTTON, doing business as Hutton Machine Works,	<i>Appellant,</i>	} <i>No. 2609</i>
<i>vs.</i>		
BRITISH COLUMBIA MA- RINE RAILWAY COMPANY, LIMITED, a corporation, claim- ant of the Steamship "Alaskan," Her Boilers, Engines, Machin- ery, Boats, Apparel and Furni- ture,	<i>Appellee.</i>	

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**Brief of Appellant**

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STATEMENT OF CASE.

This is a libel filed by the libellant against the steamer "Alaskan" on account of repair work done

by the libelant on the "Alaskan" between August 24, 1909, and September 29, 1909, and in which the British Columbia Marine Railway Co., Ltd., a corporation, intervened as claimant. The evidence shows that it became necessary to have certain repair work done on the "Alaskan," then owned by the "Steamer Alaskan, Inc.," a corporation, of the State of Washington, and that at that time Mr. John P. Urbaneck was chief engineer of the boat; that Mr. Urbaneck made out the list of repairs necessary and gave it to Mr. H. C. Bradford, who was the agent for the boat and the owners at Seattle; that Mr. Bradford took this list to Mr. Hutton and ordered the repairs made; that the repairs were made by the libelant under the supervision of Mr. Urbaneck. The libelant made two invoices of the repair work, one dated September 16th, 1909, and the other dated September 30th, 1909, each of the invoices showing the work to be charged to the "Str. Alaskan," by the libelant, which invoices were approved by Mr. Urbaneck, (Libelant's Exhibit "A"), and then presented to Mr. Bradford. The amount of the invoices was \$755.48, upon which \$154.61 was paid. Libelant had done work for the same people at other times, always charging the work and rendering the bills against the *vessels* direct. (Apostles



p. 36.) The home port of the boat was Ketchikan, Alaska, (Apostles p. 33, Libellant's Exhibit "B") and we believe the evidence shows that she was the only asset of the corporation owning her. (Apostles p. 26.) The point relied upon by the Appellee is the claim that the credit of the boat was not relied on in the doing of the repair work. The Appellant claims a lien in admiralty and under the statute of the State of Washington, Sec. 1182 of Rem. & Bal. Code of Washington, which reads as follows:

Sec. 1182. All steamers, vessels and boats, their tackle, apparel and furniture, are liable

1. For service rendered on board at the request of, or under contract with, their respective owners, charterers, masters, agents or consignees.

2. For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, sub-contractors, or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter, and for supplies furnished in this state for their use, at the request of their respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be

4.

the agent of the owner for the purposes of this chapter.

3. For their wharfage and anchorage within this state.

4. For non-performance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents or consignees.

5. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order of the subdivisions hereinbefore enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued.

## ASSIGNMENT OF ERRORS.

### I.

That the Court erred in holding that the evidence failed to prove that there was any agreement, understanding or consent on the part of the owner of the steamer "Alaskan" that the said steamer should be subject to a lien in favor of the libelant, on account of the labor performed and the material furnished, and on account of which the libel was filed herein.

## II.

That the Court erred in holding that the evidence failed to prove that the libelant, in fact, relied upon the credit of the steamer "Alaskan" in performing the labor and furnishing the labor and material and upon account of which the said libel was filed herein.

## III.

That the Court erred in holding as a matter of law that it was necessary to prove that there was an agreement, understanding or consent on the part of the owner of the steamer "Alaskan," that the labor performed, was performed, and the material furnished, was furnished, on the credit of the "Alaskan" in order to subject the vessel to a lien for the labor performed and material furnished.

## IV.

That the Court erred in entering a decree in favor of the intervening claimant and the respondent, and in refusing to enter a decree in favor of the libelant.

## ARGUMENT.

The only point raised by the Appellee was that the evidence did not show that there was such a reliance upon the credit of the vessel in doing the

work as would entitle the appellant to a lien. In the first place it will be seen that the repairs made were necessary to the operation of the vessel. (See Mr. Hutton's testimony, Apostles p. 36, and Mr. Urbaneck's testimony, Apostles p. 20.) When the repairs were made, they were charged to the vessel and invoices were made direct in the name of the vessel and not in the name of the owners. (Libellant's Exhibit "A".) This had been the appellant's custom theretofore in dealing with the owners of this vessel (Apostles p. 36), and Mr. Hutton testified that he made the repairs relying on the credit of the vessel and would not have made them on any other condition. (Apostles pp. 23 and 36.) His testimony on this point was as follows: (Apostles p. 23):

Q. I will ask whose credit these repairs were made on, whether the credit of the boat or credit of the company? A. Credit of the vessel.

Q. Would you have made these repairs on anything but the credit of the vessel? A. I would not.

(Apostles p. 36.)

Q. Had you done work for these people before? A. On several occasions.

Q. How had you charged on other occasions? A. To the vessel direct.



Q. And the bills had always been rendered to Bradford, charged to the boat direct? A. Charged to the boat, rendered to the company's office.

Q. Would you have done the work that was done on this boat on anything except the credit of the vessel? A. Absolutely not.

If Mr. Bradford, the agent for the owners of the vessel and the representative of the vessel, had believed that the appellant did not rely upon the credit of the vessel in making the repairs, it would have been most natural for him to have so testified upon his examination, but he did nothing of the kind. He makes no denial that the work was, in fact, done on the credit of the vessel. He does not claim that he thought that Mr. Hutton was not relying on the credit of the vessel but only goes so far as to say that they had no agreement on that point. He testified as follows on this point (Apostles p. 25):

Q. Was there any agreement made concerning the payment for these repairs? A. There was none.

Q. Did Mr. Hutton, or you, either of you, say anything specifically upon what credit these repairs were to be made? A. No, we did not.

Q. I will ask you directly whether or not you told Mr. Hutton that these repairs were to be made on the credit of the vessel. A. I did

not. I didn't order these repairs made as far as the bill goes.

Q. Did you ever, at any time, Mr. Bradford, engage Mr. Hutton to make any repairs on the steamship "Alaskan" under an agreement that the credit of the vessel should be pledged for the payment of the bill? A. No, I did not.

Mr. Bradford further shows in his testimony that the vessel was the only asset that the corporation had when he testified as follows (Apostles pp. 26, 27):

Q. The Ketchikan was in existence about the same time as the Steamer Alaskan Company? A. No, because we finished carrying mails; we retained the Alaskan and sold the other business, and called it the Alaskan, Incorporated.

Q. What was the financial condition of the Steamer Alaskan Company during this year? A. I couldn't tell you that.

Q. It wasn't very good, was it? A. Well, it had the value of the boat.

Q. Outside of that, it had no financial resources whatever? A. I don't know; I was simply agent.

Q. You didn't know anything about its finances? A. No further than the boat.

Had there been any other assets of the company, there can be no doubt but that Mr. Bradford would promptly have so testified or the testimony would

have been forthcoming in order to rebut any presumption of the necessity for reliance upon the credit of the vessel in order to secure repairs.

*Where the vessel upon which the repairs are made or to which the supplies are furnished is the only vessel owned by the owners then the credit is presumed to have been extended to the vessel and not to the owners.*

*McRea vs. Bowers Dredging Company*, 86 Fed. 344.

In that case Judge Hanford held that the liens were good not only under the state statute but under the general maritime law, and said:

“All of the coal consumed by both vessels while engaged in the work was purchased of the intervener, C. J. Smith, as receiver of the Oregon Improvement Company. The evidence shows that the defendant is a corporation organized under the laws of the State of Illinois. Its president and general officers, except a general manager, were not inhabitants of this state, it had no general office in this state while the work referred to was being done. The coal was furnished upon the request of the general manager, and was delivered in scows, from which it was received on board the dredgers as required for use. The evidence shows the average daily consumption of each of the dredgers, and the number of hours each was in operation; and from this data a close estimate of the amount supplied

to each can be ascertained, and a fair apportionment made, so that the liens upon each vessel will not be for a greater amount than the price of the coal which she consumed. Five thousand dollars is claimed as a set-off for work done by the dredgers in front of a wharf owned by the Oregon Improvement Company in Seattle harbor. The receiver has allowed a credit of \$4,000 for this work, and I find from the evidence that this amount is full compensation for the services of the dredgers under the contract which the defendant made with Receiver Smith. It is earnestly contended in opposition to the demand of this intervener that the evidence is insufficient to prove that there was necessity for purchasing supplies of coal upon the credit of the dredgers, and that without such necessity there can be no lien. The proof is ample to show that the supplies were ordered by the general manager of the corporation, that such supplies were necessary to enable the dredgers to do their work, and that the general manager did not have money to pay for or means to procure said supplies, otherwise than upon the credit of the dredgers. This evidence is sufficient to raise a conclusive presumption of necessity for using the credit of the vessels. *The Grapeshot*, 9 Wall. 129-145; *The Lulu*, 10 Wall. 192-204."

I cannot help but feel that Judge Neterer, in his decision in the lower Court, has held us to a stricter rule with respect to the proof of an agreement or understanding for reliance upon the credit of the vessel in making the repairs than has been estab-

lished by this Court. Even the case of *Alaska & Pacific Steamship Co. vs. "The Chamberlain*, 116 Fed. 600, relied upon by the appellee and the lower Court, holds that the reliance upon the credit of the vessel may be shown by circumstances of such a nature as to justify the inference.

In that case it was said:

"It is not necessary, it is true, that the common intent to bind the vessel be expressed in words or in the form of an agreement. It may be established by proof of circumstances from which the common intent may be deduced, but in all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel, and upon the part of the purchaser to pledge the vessel. In short, there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced, either by express words to that effect or by circumstances of such a nature as to justify the inference."

In that case the charge was made to the charterer and the seller knew that the boat was under charter, and all of the circumstances showed that the seller even did not rely on the credit of the vessel.

It would seem that the facts in this case would bring it clearly within the rule in *The Bainbridge*, 210 Fed. 620, in which case the intervener had furnished gas engines and fixtures, which were installed



in the boat, and also other material and labor. The lower Court found that there was no agreement under the terms of which the material and labor furnished and performed were to be furnished and performed on the faith and credit of the vessel and concluded that the case came within the rule of *Alaska & P. S. S. Co. vs. C. W. Chamberlain & Co.*, 116 Fed. 600, and dismissed the intervener's libel. This Court, in reversing the lower Court, said:

“In the case so referred to, and relied upon by the Court below, a lien was claimed for supplies furnished a vessel at her home port at the instance of the charterer. There was no evidence even tending to show that the supplies were furnished on the faith and credit of the vessel. The evidence, so far as it went, was to the contrary. The bills which were made out and presented for the supplies were made against the charterer, and the failure of the libelant to produce its books on the trial was taken as indicating that the supplies had not been charged against the vessel. In the present case the facts are materially different. The intervening libel is brought to enforce a lien for machinery and repairs which went into the vessel and enhanced her value. The only testimony on the subject of the understanding between the parties is that of the president of the appellant, who testified as follows:

“Q. State whether or not, in the furnishing of the material that you have testified, and the work performed on the vessel in placing the engine equip-

ment in the vessel, whether or not you depended upon the credit of the vessel for payment? A. Any time we furnish anything for any vessel, we always hold the vessel; that is, we bill to the vessel, and hold the vessel for the repairs. Q. Well, at the time you agreed to furnish the machinery and perform these services testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for the payment of the amount in case it was not paid? A. No; I did not have any understanding to hold the vessel; it was not mentioned. I did not mention it; but it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel, as I remember.'

"We think that there is enough in this testimony and the circumstances to show that the work was done, and the material was furnished, upon the faith and credit of the vessel. There was an understanding that the appellant was to hold the engine until final payment was made. The engine, representing almost the entire outlay of the appellant, having gone into the vessel, there was no way by which the appellant could hold the engine, otherwise than by holding the vessel. The owner must have understood that the vessel was liable for the material and machinery so furnished, for at the time, while this work was being done, King & Winge, who were making other repairs, were told by the owners: 'The boat is good for the work.'

"The statute of Washington (Section 1182) makes all vessels, their tackle, apparel and furni-

ture, liable for work done or material furnished in that state for construction, repair, or equipment at the request of their owners, or persons having charge of their construction, alteration, repair, or equipment. In view of the terms of the lien law, and the fact that in the present case the appellant furnished valuable machinery, which became part and parcel of the vessel, slight evidence should be required to establish the fact that the work was done and the material furnished on the faith and credit of the vessel, especially where, as here, there is entire absence of evidence to indicate a contrary intention.' ”

See also the following cases:

*F. A. Kilburn*, 179 Fed. 107;

*Robert Dollar*, 115 Fed. 218;

*The Del Norte*, 90 Fed. 506;

*The Iris*, 100 Fed. 104;

*The Vigilant*, 151 Fed. 747;

*Berwind-White Coal Mining Co. vs. Metropolitan Trust Co.*, 166 Fed. 782.

In the case of *The F. A. Kilburn*, 179 Fed. 107, one Frank was the owner of the steamer at the time the repairs were made and it was under charter to Crescent Wharf & Warehouse Company, and in that case the Court, setting forth the evidence upon which the claim for lien was based, said:

“The evidence shows that the Independent Steamship Company operated the *F. A. Kilburn*, as well as other ships, chartered as well as owned by the Crescent Wharf & Warehouse Company; that one Walton was the agent of the company at San

Francisco, one Mott at San Pedro, and C. F. Lehman was president and manager of both companies. John T. Flynn was the chief engineer of the steamer at the time it was chartered, and had been such during all the time of Frank's ownership, and for a considerable period before. He continued such chief engineer until subsequent to the transactions here in question. The principal part of the repairs and supplies for which this libel was brought grew out of the breaking of the winches of the ship. Flynn testified, among other things, as follows:

“ ‘In this particular case the winches were broken down by being overloaded. The capacity of the winches was two tons apiece. They took a launch aboard that weighed nine tons, and they broke the winch down. It was within an hour of sailing time. Mr. Walton, the agent of the Independent Steamship Company, asked me if I could do anything with those winches. I said that it would take all night to get them ready. He said there would be a man come aboard at San Pedro to fix them, and on the arrival of the vessel in San Pedro Mr. Mills, the bookkeeper—on the arrival of the ship at San Pedro, Mr. Mills, the bookkeeper, and a machinist, came aboard, the man who does Mr. Lehman's work. He said it was impossible to do it at San Pedro. I told him that we could get the freight out with one winch. On the arrival in San Francisco, I immediately went to the office and told Mr. Walton what Mr. Mills and the machinist had said at San Pedro. He told us to have the work done as quick as we could, and, as we did not want to delay the vessel, I telephoned to Mr. Carroll (one

of libellant's employees), and he came down. He said that he would have to take the winch to the shop. The order was to get it done as quickly as possible. They worked night and day, and they had it ready in three days. The next trip they took the other off. When we went on that run, the vessel was making a four or five days schedule, and they cut it down——"

"The evidence contained in the record leaves no room for doubt that the appellee performed the work and furnished the supplies charged for, and we think that it sustains also the findings of the trial Court that the charges therefor were reasonable. The evidence is without conflict that the appellee did the work and furnished the supplies upon the credit of the vessel, as it had been doing upon the order of the same chief engineer during the then 3½ years which he had occupied the position, and during which the appellee had from time to time done about thirty jobs upon the vessel, some of which were performed during Frank's ownership and some previous to his acquiring the vessel—the charges therefor in the books of the appellee always being made against the vessel and the owner. *It is true that the evidence is also without conflict to the effect that Frank, whose home was in San Francisco, did not know of the repairs and supplies in question, and was never told of them by either the appellee or Flynn, and that the appellee never made any inquiry as to who the owner of the ship was.* It is undisputed, however, that during all of the time Flynn was chief engineer upon the vessel, whenever repairs thereon were needed, he ordered them made by ap-



pellee, which the appellee did upon the credit of the vessel, always charging the same to the vessel and the owner, all of which charges previous to those here in question were paid, and that not only did the owner, Frank, in executing the charter above referred to, reserve the right to retain Flynn as the chief engineer, but Lehman's testimony is to the effect that Frank wanted Flynn so employed 'to keep the vessel in good condition,' and Frank himself testified:

“ ‘When I chartered the steamer to the Crescent Wharf & Warehouse Company, I went down to the steamer, and told Mr. Flynn I had chartered it to the Crescent Wharf & Warehouse Company, *and that under the charter they were to make all repairs*, and keep the steamer in the same condition she was in on the day I turned her over, and that he was to see that they did that. If he needed anything, he was to go to them, and see he got whatever she needed, and, if they did not do the work, to let me know. The same instructions were given to the captain.’ ”

The evidence in that case is NOT as strong as the evidence in favor of Hutton for the evidence shows only that the repairs were necessary, that the libellant had made other repairs, charged the same to both the vessel and the owner, as they were charged the time for which the lien was claimed. The evidence shows further that the man who ordered the repairs made had positive orders to see that

all repairs made on the vessel were made at the expense of the charterers, so that when he ordered the repair work he could not have understood that it was to be done on the credit of the vessel.

The appellant feels that his showing that the repairs that he made were necessary to the operation of the boat; that he charged them to the vessel and not to the owner as they were made; that the vessel was the only asset of the owner; that although the vessel was owned by a Washington corporation it was not registered in Washington but in Alaska, and that its home port was Ketchikan, Alaska; that the libelant had done other work for the owners of the vessel before this work and had charged to the vessel and rendered the bills to the owners in that way; that he would not have done the work except upon the credit of the vessel, is a sufficient showing of circumstances to justify the inference that the work was, in fact, done upon the credit of the "Alaskan."

As in the case of "The Bainbridge" there is an entire absence of evidence to indicate an intention not to rely on the credit of the vessel. As in that case the appellant has made valuable improvements upon the vessel, and the vessel and the owner have

received the benefit of the improvement and should pay the bill. In "The Bainbridge" the Court said: "SLIGHT EVIDENCE SHOULD BE REQUIRED TO ESTABLISH THE FACT THAT THE WORK WAS DONE AND THE MATERIAL FURNISHED ON THE FAITH AND CREDIT OF THE VESSEL, ESPECIALLY WHERE, AS HERE, THERE IS AN ENTIRE ABSENCE OF EVIDENCE TO INDICATE A CONTRARY INTENTION."

The appellant feels that the evidence in that case was no stronger than in this case and that in this case the lower Court should be reversed and a decree entered in his favor for the full amount of his claim and interest and costs.

Respectfully submitted,

H. A. MARTIN,

Proctor for Appellant.



No. 2609

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ARTHUR F. HUTTON, doing  
business as Hutton Machine  
Works,  
Appellant,

VS

BRITISH COLUMBIA MA-  
RINE RAILWAY COMPANY,  
LIMITED, a corporation, claim-  
ant of the Steamship "Alaskan,"  
Her Boilers, Engines, Machin-  
ery, Boats, Apparel and Furni-  
ture,  
Appellee.

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**Brief of Appellee**

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IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,  
Proctors for Appellee.

614 Colman Bldg.,  
Seattle, Wash.

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Press of Pliny L. Allen, Seattle, Washington

FILED

SEP - 9 1914

F. D. MONCKTON,  
CLERK.





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ARTHUR F. HUTTON, doing  
business as H u t t o n Machine  
Works,

Appellant,

VS

BRITISH COLUMBIA MA-  
RINE RAILWAY COMPANY,  
LIMITED, a corporation, claim-  
ant of the Steamship "Alaskan,"  
Her Boilers, Engines, Machin-  
ery, Boats, Apparel and Furni-  
ture,

Appellee.

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**Brief of Appellee**

---

IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,  
Proctors for Appellee.

614 Colman Bldg.,  
Seattle, Wash.



No. 2609

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IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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ARTHUR F. HUTTON, doing  
business as Hutton Machine  
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vs

BRITISH COLUMBIA MA-  
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LIMITED, a corporation, claim-  
ant of the Steamship "Alaskan,"  
Her Boilers, Engines, Machin-  
ery, Boats, Apparel and Furni-  
ture,

Appellee.

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**Brief of Appellee**

---

**ARGUMENT.**

In this cause the libelant claimed a lien under the state statute. The trial court rejected the claim in an exhaustive opinion (Ap. 38-40). Sub-

sequently a motion for a rehearing was made and upon argument thereof proctor for libellant not only reargued his cause upon that theory, but also claimed a lien under the general admiralty law. In a second and even more exhaustive opinion the court held that libellant had no lien upon either theory. (Ap. 41-45). These opinions may well serve as our brief in this cause and it would be an imposition upon the court to wholly restate the matter therein contained. We shall therefore content ourselves with a few observations in reply to appellant's brief.

#### NO LIEN UNDER STATE LAW.

We do not understand that the rule of the well known *Chamberlain* case has been in any way abrogated. That case held that in order to establish the lien it was necessary to show that such was the intention of both parties to the transaction and it was not sufficient to show that the vendor so understood or that he charged the supplies to the vessel. It was, however, held that the common intent to bind the vessel need not necessarily be expressed in words, but that it might be deduced from circumstances of such a nature as to justify the inference.

The cases which appellant so much relies on as relaxing the rule of the *Chamberlain* case are in fact in strict accord with it. A common understand-



ing is still necessary, but as the *Chamberlain* case pointed out it may be found from circumstances rather than express words. Thus in "*The Bainbridge*," 210 Fed. 620, it was found that the owners had told King and Winge who were making some of the repairs, that the boat was good for the work, and in addition had agreed that the libelants were to hold the engines until final payment. Since this could be done only by maintaining a lien upon the boat the court held that an understanding that there should be a lien would be inferred.

Again in the *F. A. Kilbourn*, 179 Fed. 107, which appellant quotes at length and largely relies upon, it appeared that through a long course of dealing extending over three and one-half years the libellant had done thirty jobs on credit of the vessel for all of which the libellant had been paid. From this long continued acquiescence the court inferred that the owner had consented that the libellant should have a lien.

It is argued that the circumstances are present here and it is important that the record on this point be understood. Hutton testified in part as follows:

"Q. Had you done work for these people before?

A. On several occasions.

Q. How had you charged on other occasions?

A. To the vessel direct.

Q. And the vessel had always been rendered to Bradford charged to the boat direct?

A. Charged to the boat, rendered to the company's office." (Ap. 36).

But appellant in an attempt to fix the lien upon another theory points out that the owner had but one boat, the "Alaskan"; and Hutton immediately after giving the above testimony further testified as follows:

"Q. Mr. Hutton, had you previously done work on this particular boat the "Alaskan"?

A. Not to my recollection." (Ap. 36).

Accordingly there had been no previous course of dealing by which the bills had always been rendered to the owner and paid. The confusion arises out of the fact that Bradford was agent for other companies. (Ap. 26). And it was clearly with these other companies that Hutton had his course of dealing through Bradford. Bradford testified very clearly that there was no agreement between him and Hutton, that these repairs should be made upon the credit of the vessel, and that nothing was said upon the subject. (Ap. 26). It must have been a great temptation to Hutton to deny this yet with commendable honesty he did not do so when called on rebuttal. (Ap. 35-36). And so the only evidence we have on the subject is his original evidence that the repairs were charged to the vessel and that he intended to hold the vessel. In appellant's brief we are taken to task for not denying

the latter statement, but how in the nature of things can one deny another's secret intention?

The fact is that the libellant's case rested upon Hutton's statement that he billed the repairs to the vessel and intended to claim a lien. Under such circumstances there was nothing for the trial judge to do other than to follow the authority of the *Chamberlain* case.

"But in order to establish that fact it is necessary to show that such was the intention of both parties to the transaction. It is not sufficient that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account."

*Alaska & P. S. S. Co. v. C. W. Chamberlain & Co.*, 116 Fed. at 602.

## NO LIEN UNDER GENERAL ADMIRALTY LAW.

When the matter just discussed was being re-argued on rehearing the Court became apprised of the fact that the vessel was registered at Ketchikan and was disposed to think that the libellant might have a lien under the general admiralty law. It was finally stipulated by the proctors in open court that any amendments necessary to raise the question might be considered as having been made. The Court then desired that authorities be fur-

nished on this latter phase of the case. Most of the authorities submitted are referred to in the second opinion of the Court reaffirming his former opinion that there was no lien under the state law and in addition finding that there was no lien under the general admiralty law. (Ap. 41-43).

In every case where the question has arisen it has been held that with reference to the lien law "home port" means not where the vessel is registered but where her owner resides.

The vessel in this case was registered in Ketchikan but her owner was a Washington corporation and therefore as to material men, Seattle was her home port. In view of the fact that proctor does not seem to except to this portion of the Court's ruling we do no more than cite the best considered cases on the subject.

*The Albany*, Vol. 1 Fed. Cas. No. 131.

*St. Jago De Cuba*, 9 Wheaton 409.

*The Rapid Transit*, 11 Fed. 323.

The court will note that the last case is on all fours with the case at bar. The vessel in that case was registered in Cincinnati, Ohio. The repairs were made in Kentucky and she belonged to a Kentucky corporation. The court held that there was no lien under the general admiralty law.

We submit that the decree of the lower court should be affirmed.

Respectfully submitted,

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Proctors for Appellee.



